United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT
SUPPLEMENT
and
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,939

ROBERT A. SCHMITZ
Appellant,

v.

ROBERT F. KENNEDY,
Attorney General of the United States,
and
SOCIETE INTERNATIONALE, etc.,
Appellees.

9222

Appeal from an Order of the
United States District Court for the
District of Columbia

ROBERT M. HAUSMAN
One Farragut Square South
Washington, D. C. 20006

Counsel for Appellant

DAVID GINSBURG
HAROLD LEVENTHAL

Of Counsel

STATEMENT OF QUESTIONS PRESENTED

1. In a suit brought under section 9(a) of the Trading with the Enemy Act to recover property, where the plaintiff and the Government have filed a Stipulation of Settlement providing for sale of the property and payment of a sum of money, with the suit to be concluded by a consent judgment or, in the alternative, a praecipe of dismissal with prejudice, and where the court has made the settlement possible by certain judgments and orders, should not the same court make the fee determinations required by section 20 of the Trading with the Enemy Act, 60 Stat. 54 as amended, 70 Stat. 331, 50 U.S.C. App. 20?

2. In making the determinations required by section 20 of the Trading with the Enemy Act, must not the court permit intervention by the payee of fees that are due and owing, when the property claimant will not voluntarily pay the fees or submit them to the court for consideration under section 20?

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BRIEF FOR APPELLANT

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This civil action is a proceeding under the Trading with the Enemy Act. Section 20 of that Act requires the District Court to determine that it has received satisfactory evidence that the aggregate of agents' and attorneys' fees does not exceed ten per cent of the recovery, or to authorize a larger amount if justified by circumstances of unusual hardship. No such fees may be paid which are not approved under section 20. Such fees are due to appellant, and he moved to intervene to participate in the section 20 determination. Appellant's motion was denied. This Court has jurisdiction because the denial by the court below of appellant's petition to intervene under Rule 24 F.R.C.P. is a final order and may be reviewed by this Court under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The Alien Property Custodian, acting under the Trading with the Enemy Act, 40 Stat. 415 as amended, 55 Stat. 839, 50 U.S.C. App. 5(b), vested in himself the American assets of a Swiss corporation known as *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* (Throughout the litigation this corporation has been frequently referred to as Interhandel, and is referred to as Interhandel herein.) These assets consisted of more than 90% of the capital stock of General Aniline and Film Corporation of Delaware (GAF) and certain bank accounts. Interhandel sued to recover these assets under section 9(a) of the Trading with the Enemy Act (hereinafter sometimes referred to as "TWEA"), 40 Stat. 419, amended, 41 Stat. 35, 42 Stat. 1065, 50 U.S.C. App. 9(a), claiming they were illegally seized. The Attorney General answered, claiming that Interhandel was controlled by officers and stockholders who were engaged in a conspiracy with the German Government and German nationals to conduct the business of General Aniline and Film Corporation in their interest during the war with

Germany, and that, therefore, the vesting was authorized by law. A number of Interhandel stockholders, asserting their individual non-enemy status, intervened to recover their proportionate interest in the assets. JA 24-26.

Interhandel and the Government have now entered into and have filed a Stipulation of Settlement, to which most of the interveners have consented. Under it GAF will be recapitalized, the stock will be sold, and Interhandel will receive a portion of the proceeds. The Stipulation, and the Supplementary Agreement amending it, are part of the record on appeal.

At this point, appellant moved to intervene, asserting his right to fees for services rendered in connection with Interhandel's recovery. JA 6.

In winding up a statutory TWEA proceeding the court must review agents' and attorneys' fees in accordance with section 20 of the Act, 70 Stat. 331, 50 U.S.C. App. 20. Section 20 requires that "satisfactory evidence" be furnished to the court that the aggregate of fees paid to agents and attorneys, in connection with any return or payment, is not more than ten percent of the return or payment.

If the fees claimed total more than ten percent, the court must examine the reasonableness of each fee. It may then adjust one or more fees to maintain the ten percent limit, or, finding hardship, it may allow an aggregate greater than ten percent, as the sum of the reasonable fees.

The Stipulation of Settlement provides that Interhandel will furnish the "satisfactory evidence" required by section 20, but Interhandel has indicated that it does not intend to include the fees payable to appellant. JA 2, 7.

The appellant, Robert A. Schmitz, is the son of the organizer and pre-war President of GAF. He has been closely associated with the

principals of Interhandel. Since the vesting, appellant, with the knowledge and approval of Interhandel, has been actively engaged in efforts to secure a return of the GAF shares to Interhandel, or just payment in lieu of return. Complaint of Robert A. Schmitz, JA 8.

In 1958, Interhandel was seeking a prominent American to negotiate on its behalf with the United States Government. Appellant offered to try to interest Mr. Charles E. Wilson, formerly President of General Electric, in assuming this task. Interhandel promised appellant that if he were successful in securing the services of Mr. Wilson, it would pay appellant five per cent of any recovery that Interhandel might ultimately obtain on its claim. After devoting almost all of his time and effort to the task for a period of eighteen months, appellant succeeded in convincing Mr. Wilson to undertake the negotiations. Mr. Wilson acted as trustee for Interhandel, with full powers and without accepting any compensation, for a period of over two years. *Id.*, JA 8-11.

During the first 19 months of the trusteeship, and in furtherance of it, appellant performed important services for Interhandel, of a reasonable value of $150,000; Interhandel paid appellant only $38,000 for these services. *Id.*, JA 11-12.

In the present posture of the case the above facts must be taken as true. They establish that appellant is entitled to a fee of five per cent of Interhandel's ultimate recovery under his contract with Interhandel and an additional $112,000 for the value of services rendered in connection with the trusteeship. Thus, more than half of the ten percent in aggregate of fees allowed by section 20, in the absence of a finding of hardship, is payable to appellant.

PROCEEDINGS BELOW

The court below has resisted both entering a consent judgment and making the determinations required by section 20 of the Trading with the Enemy Act, although both actions have been urged on it by the Government and by Interhandel, with the approval of the Consenting Interveners.

The court first denied a motion (filed October 14, 1963) to permit the parties to submit a consent order carrying their Settlement Agreement into effect and requesting its entry if it be acceptable to the court.

On that occasion, the court said:

> "I might add that the whole tenor of the present motion before me, as well as the proposed order, consent order and consent judgment embodying the agreement between plaintiff and defendants appear to be predicated upon the desire of its proponents that the Court place its seal of approval or imprimatur upon the agreement. * * * The court cannot and should not allow itself to be made a rubber stamp in order to facilitate a disposition of this case or to dilute responsibility for settlement, which after all, resides in the parties and their counsel. . ."

The court rejected the analogy to a consent decree in an antitrust action. (Memorandum of the Court filed October 17, 1963.)

On December 20, 1963, the parties filed a Stipulation of Settlement and a joint motion requesting certain relief. The court filed a "Memorandum to the Clerk" on March 3, 1964, indicating the nature of the order on the joint motion which it would be willing to sign. With reference to the entry of a judgment, the court said:

> "Attention of counsel is also directed to certain language in the Stipulation relating to the entry of a judg-

> ment (e.g. § V, par. 4, § XIII, par. 5 & 6, and § III, par. 1 e). Whether a consent judgment will be entered is not now before the Court as counsel have stated, but the Court has questioned its necessity and propriety. Counsel might be well advised to consider whether the Stipulation should not be amended to make it more flexible by adding the words 'or dismissal with prejudice' where the word 'judgment' alone is used." JA 4-5.

Accordingly, the parties then amended the Stipulation of Settlement to provide for conclusion of the suit either by a consent judgment or by a joint praecipe of dismissal. (Supplementary Agreement dated March 25, 1964.)

On April 15 the court issued findings of fact and conclusions of law, and a consent order that (1) the stockholder interveners are not a class for the purpose of Rule 23 and the court's approval of the settlement is not required; (2) the non-consenting stockholder interveners are not adversely affected by the settlement, and (3) an interlocutory injunction, which would have prevented the recapitalization and sale, be dissolved. (Order filed April 15, 1964.) JA 5-6.

The court made no decision on whether it would enter a consent judgment or on whether it would make the determinations required by section 20.

On May 7, 1964, appellant moved to intervene, of right and permissively, to participate in the section 20 phase of the proceeding, because the fees due him for services to Interhandel are cognizable under section 20.

The court below said that it had no duty under section 20, unless there was "the entry of a judgment in the future" in the main case. Absent the formal entry of a judgment, the court thought appellant's only recourse was to the Attorney General, as designee of the President, under the branch of section 20 relating to administrative returns

of vested property. The court, although it still did not determine whether it would enter such a judgment, stated that it was disinclined to do so, and denied the motion to intervene. JA 24. It did not reserve decision on the motion pending its decision whether to enter a consent judgment.

This appeal is from that denial.

TEXTS OF STATUTES AND RULES

Trading With The Enemy Act

Section 20

> "Fees of agents, attorneys, or representatives
> No property or interest or proceeds shall be returned under this Act, nor shall any payment be made or judgment awarded in respect of any property or interest vested in or transferred to any officer or agency of the United States under this Act unless satisfactory evidence is furnished to the President or such officer or agency as he may designate, or the court, as the case may be, that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment. Any agent, attorney at law or in fact, or representative, believing that the aggregate of the fees should be in excess of such 10 per centum may, in the case of any return of, or the making of any payment in respect of, such property or interest or proceeds by the President or such officer or agency as he may designate, petition the district court of the United States for the district in which he resides for an order authorizing fees in excess of 10 per centum and shall name such officer or agency as respondent. The court hearing such petition, or a court awarding any judgment in respect of any such

property or interest or proceeds, as the case may be, shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of fee, accepted prior to approval hereunder, in excess of the fee as approved, shall be guilty of a violation of this Act." 60 Stat. 54 as amended 70 Stat. 331, 50 U.S.C. App. 20.

Section 30

"Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia, as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, of any money or other property held by the Alien Property Custodian or by the Treasurer of the United States." Oct. 6, 1917, c. 106, § 30, as added Mar. 10, 1928, c. 167, § 15, 45 Stat. 275, 50 U.S.C. App. 30.

Section 32 (f)

"(f) At least thirty days before making any return to any person other than a resident of the United

States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. * * * After publication of such notice of intention and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States . . . in the same manner as property of the person to whom return is to be made: Provided, That notice of any writ of attachment which may issue prior to return shall be served upon the Alien Property Custodian. * * * [T]he President or such officer or agency as he may designate shall accord full effect to any such attachment in returning any such property or interest or proceeds." 60 Stat. 925, 50 U.S.C. 32(f).

Federal Rules of Civil Procedure

Rule 1

"[These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 24

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in

the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

STATEMENT OF POINTS

1. Congress intended that a court sitting on a Trading with the Enemy Act suit also make the determination as to fees required by section 20 of the Act. The court erred in holding that in a suit which is concluded by a compromise, Stipulation of Settlement, and joint praecipe of dismissal, the supervision of fees required by section 20 is to be performed by the President or his designee, rather than by the court.

2. The court below is the proper forum to adjudicate appellant's cause and is the only forum that can fully dispose of it. The court below erred in failing to recognize its duty to do so, ancillary to the section 20 phase of the proceeding.

3. The appellant should have been permitted to intervene of right under Rule 24(a) (2), F.R.C.P., because he will be bound by the court's section 20 determinations.

4. The appellant should have been permitted to intervene of right under Rule 24(a) (3), F.R.C.P., because he will be adversely affected by the disposition of property which is subject to the control of the court. The court below erred in holding that the property is not subject to its control within the meaning of Rule 24(a) (3).

5. The failure of the court below to consider the appellant's

grounds for permissive intervention was an abuse of discretion. These grounds included the following: that appellant's claims present questions of law and fact in common with those which must be decided in making the section 20 determinations; and that related controversies should be disposed of in a single action.

SUMMARY OF ARGUMENT

Section 20 of the Trading with the Enemy Act limits the aggregate of attorneys' and agents' fees to ten percent of the return or recovery, but allows the court to set a higher aggregate if it finds circumstances of unusual hardship. "The statute is . . . designed to protect the owner seeking restoration of seized property from unreasonable . . . fees for services." *Kroll v. McGrath,* 91 App. D. C. 172, 199 F.2d 187 (1952). If the fees claimed total more than ten percent, the court must examine the reasonableness of each fee. It may then adjust one or more fees to maintain the ten percent limit or, finding hardship, it may allow an aggregate greater than ten percent, as the sum of the reasonable fees. It is a criminal offense to receive a fee in excess of the amount approved.

The court that is seized of a suit for return of vested property under the Trading with the Enemy Act should also oversee the allowance of fees under section 20 of that Act. This is apparent on the face of the statute if the award is made upon entry of judgment, whether after full adjudication or by consent. This much was admitted by the court below.

The same result should follow if the judicial proceeding is terminated by a compromise and settlement. A distinction, for this purpose, between a "judgment" and a suit ending in a compromise settlement is "too formal to be sound", *Lyeth v. Hoey,* 305 U.S. 188 (1938). This is the position not only of the appellant but of both Interhandel and the Government. It is the procedure followed by Judge Walsh in

Aratani v. Kennedy, D.C.D.C., CA No. 3464-58, 228 F. Supp. 706 (1964).

Interhandel cannot control the scope of the Court's function under section 20 by refusing to include appellant's fee on the schedule it submits in accordance with the Stipulation of Settlement. Judge Walsh, in the *Aratani* case, *supra*, did not limit himself to claims for fees presented to him by parties and counsel in the main action. Instead, he endeavored to discover and determine whether any other claims for fees existed.

This is as it should be. A court sitting in a statutory proceeding should determine all aspects of it necessary to carry out the statutory plan and the Congressional purpose. In this case, in particular, the Congressional intention to protect persons seeking restoration of vested property from unreasonable fees can best be effectuated by considering all claims for fees in connection with the determination required by section 20 of the Act.

No other court, here or abroad, can fully dispose of the appellant's claims because no other court has the authority to supervise fees in accordance with section 20. An independent suit here would probably be consolidated with this action, and one brought in another district would be transferred and consolidated.

Indeed, in a similar case involving Indian claims, the Court considered applicants for a limited aggregate of attorneys' fees to be indispensable parties, and dismissed the proceeding for failure to join them. See *Ducker v. Butler*, 70 App. D.C. 103, 104 F.2d 236 (1939).

As a practical matter, appellant has nowhere else to go, even for an award conditioned on subsequent approval under section 20. He cannot obtain jurisdiction over Interhandel or its property in the United States other than by this intervention, and he would be severely disadvantaged if he were required to bring a suit abroad. Congress had these very disadvantages in mind, and sought to provide against them.

Sections 30 and 32(f) of the Act, and the legislative history, indicate that Congress intended that American creditors of aliens who received returned property should not have to sue abroad.

Such circumstances moved the court in *Rashap v. Brownell*, 229 F.2d 193 (2d Cir. 1956) to permit a cross-claim for services against an alien property claimant such as Interhandel.

The court below is the proper forum to adjudicate appellant's cause. His claims are intimately related to the main action. The recovery appellant helped to make possible, and out of which he was promised payment, is before the court. The forum is convenient for all the parties. The judge sitting on the case is already familiar with the long and involved history of the matter, and he would be called upon to hear the same evidence later in determining the reasonableness of appellant's fees.

Appellant's cause meets the requirements of Rule 24 F.R.C.P. for intervention, both of right and permissively. He may be bound by the section 20 determinations, and he will be adversely affected by the distribution of property in the control of the court. Appellant's application for permissive intervention was not considered by the court below. There are common questions of law and fact, and the court should have acted to avoid multiplicity of suits and to settle related controversies in a single action. It was an abuse of discretion to refuse to consider these matters.

The court below must adjudicate appellant's claims for fees and include any sums determined to be due in the calculation of the aggregate of fees required by section 20. How else can it make that calculation?

ARGUMENT

I. The Court Below Is the Proper Forum To Adjudicate the Appellant's Cause.

A. Congress Intended That a Court Sitting on a Trading With the Enemy Act Suit Also Carry Out the Supervision of Fees Required by Section 20 of the Act.

In the present posture of the case, it must be taken as true that Interhandel is obligated under an express contract to pay appellant five per cent of its ultimate recovery as well as an additional $112,000 for the value of other services rendered in connection with the recovery, subject only to the determination required by section 20 of the Act.

Section 20 of the Trading with the Enemy Act, 60 Stat. 54 as amended, 70 Stat. 331, 50 U.S.C. App. 20, requires the District Court, or the President or his designee, "as the case may be," to determine that satisfactory evidence has been furnished "that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment." At the petition of any agent or attorney, the District Court "awarding any judgment" may set a higher aggregate, "upon a finding that there exist special circumstances of unusual hardship." If the fee claims total more than ten percent, the court must pass on the reasonableness of each of them. In the case of an administrative return, the Attorney-General administers the ten percent limitation, and an aggrieved agent or attorney must petition the district court where he resides.

In adopting section 20, Congress has devised an orderly plan for the supervision of fees. It contemplated two situations, and pro-

vided for each: (1) Where a judicial action has been brought, the court in which the proceeding is lodged will complete it, including the supervision of fees. (2) Where no court is involved, as in an administrative return, the President or his designee will limit the aggregate of fees to ten percent of the return or payment, and any fee claimant who seeks extraordinary relief must petition the district court where he resides.

This is not only the view of appellant. It represents the considered opinion of both Interhandel and the Government, given in response to a request from the court below as to their views on the court's function under section 20. In a joint memorandum, approved by the consenting interveners, they said:

> 'It is our position that in the present case, it must be the Court which receives 'satisfactory evidence' rather than the President or his delegate.
>
> 'In the first place, the statute appears to contemplate that where a Trading with the Enemy Act claim is disposed of on an administrative level, the determination that fees do not exceed the statutory limit should be made by the administrative agency. On the other hand, where the claim is prosecuted in Court and is terminated by a judgment, the Court must make the determination. Thus, either the Attorney General or the Court must make the requisite finding. In the present case, where the 'payment' of 'proceeds' is to be made pursuant to the settlement of Court proceedings — a settlement which cannot be effected without the assistance of the Court — it seems clear that the Court should make the Section 20 determination.
>
> 'In the second place, as this Court is aware, the Defendants and the Plaintiff contemplate the conclusion of this litigation among themselves by consenting to the entry of a judgment in an amount to be determined by the agreed formula after the sale

> of GAF shares. If the Court should enter such a judgment, we submit that there can be no doubt that it would be the Court which would receive satisfactory evidence that the fees do not exceed the limit. (Second Supplemental Memorandum of the Defendants and the Plaintiff, filed February 27, 1964.)

In taking this position, the Attorney General is making an administrative determination of his own function under section 20, for he is the officer who must act under that section if the court is not required to. Under familiar principles, this administrative determination is entitled to great weight.

There is no material difference between a consent judgment, such as that proposed in Schedule E of the Stipulation of Settlement, JA 2-3, and the alternative conclusion of the suit provided in section XIII, par. 5 of the Stipulation, JA 3, i.e. the Stipulation, providing for a money payment, and the filing of a joint praecipe of dismissal with prejudice. Such a joint praecipe is *res judicata*. *Burns v. Fincke*, 90 App. D.C. 381, 197 F.2d 165 (1952). The parties to the main action herein originally sought a consent judgment, and they amended their Stipulation of Settlement to provide the alternative only because the District Court indicated its reluctance to sign such a judgment. JA 4-5, 30-31.

Where a statute provides for a certain result when a judgment is rendered, it will be held applicable to a settlement of litigation. In *Lyeth v. Hoey*, 305 U.S. 188 (1938), the petitioner, not named in the will of the decedent, received property from the estate in compromise of litigation in which he sought to take against the will as an heir. The Supreme Court held that such property was received by inheritance for the purpose of the pertinent statutory exemption from income tax; that "the distinction sought to be made between acquisition through . . . a judgment and acquisition by a compromise agreement

in lieu of such a judgment is too formal to be sound." 305 U.S. at 196. To the same effect, see *Helvering v. Safe Deposit and Trust Co.*, 316 U.S. 56, 65 (1942).

The participation of the court below in the settlement was more than nominal. The main action could not have been concluded without the court's active help. It made findings, orders and judgments (1) that the stockholder interveners are not a class such that the court's approval of the compromise is required under Rule 23 F.R.C.P., (2) that the rights of the non-consenting stockholder interveners are not adversely affected by the Stipulation of Settlement, and (3) dissolving an interlocutory injunction which would have blocked the recapitalization and sale. JA 5-6. The conclusion of the main action cannot be characterized as simply a private agreement. As noted above, this was the position of the Government and Interhandel below.

The court has indicated its disinclination to enter a judgment. Apparently it intends to wait as long as possible before actually making a decision on this point. The Government and Interhandel have been forced to provide for alternative means of ending their suit. Although the denial of appellant's motion is a final order, he is left in doubt regarding his rights should the court eventually decide to enter judgment.

Neither the appellant's cause nor the vindication of the statutory scheme should be held in abeyance while the court determines the essentially formal question of whether to enter a consent judgment. The main case has been, and remains, before the District Court. The payment to be made to Interhandel under the Stipulation of Settlement is not an administrative return on the determination of the President or his designee, but a partial victory for Interhandel in the lawsuit. The settlement could not have been accomplished without the aid of the court.

Aratani v. Kennedy, D.C.D.C., C.A. No. 3164-58, 228 F. Supp. 706 (1964), is instructive. As in the case at bar, a compromise settlement was entered by the parties (and, because it was a class action, found by the court to be fair and reasonable), and Judge Walsh then entertained a petition to approve fees under the provisions of section 20. The petition did not invoke the aid of the court based on the residences of the petitioning attorneys but, apparently, as the orderly next step in the proceeding. In an interlocutory order, later made final, Judge Walsh approved the fee claims of each of the lawyers, and an aggregate of twenty percent. There is no indication that there is, or will be, a judgment in that case, denominated as such.

Judge Walsh did all that he reasonably could do, to ascertain the existence of, and determine, claims cognizable under section 20 which were not presented to him by the parties and counsel before him in the main action. In his "Memorandum and Final Order" filed May 18, 1964, Judge Walsh said:

> "Immediately prior to the final hearing, a written objection to the allowance of counsel fees was filed by an attorney from Los Angeles, California. His objection was based on the representation that he was retained by five of the claimants in 1940, that he filed their claims and is entitled to compensation. A response was filed by counsel of record, and thereafter that attorney filed a declaration under oath stating that in view of all the facts he believes that he is not, nor ever was, entitled to any fee allowed to counsel of record by this court.
>
> "As a result of this claim, the Court inquired as to the possibility of fees owed to other counsel, who at one time or other participated in claims on behalf of the parties. Mr. Thomas H. Carolan, one of the attorneys for the claimants, undertook a search of the records, and informed the court

> that there is a possibility that other counsel are entitled to nominal fees from the amount allowed. Mr. Carolan represented to the Court that he and his associate counsel of record are prepared to pay, and will pay, attorneys who filed retainer agreements with the Office of Alien Property prior to March 17, 1964.
>
> "On May 1, 1964, Mr. Carolan wrote to all other attorneys listed on the claims of record, and requested that they inform him of any fees to which they may be entitled.
>
> " * * *
>
> "The Court is satisfied that a diligent effort has been made to locate and inform all attorneys who may have performed services in these actions." Supp. 9-10.

Note that compensation for non-legal services (lobbying) was considered cognizable under section 20 in the *Aratani* case. See 228 F. Supp. at 709.

This result reflects broad principles of orderly litigation. A court with a statutory proceeding before it should take jurisdiction of all aspects incident to carrying out the full statutory plan and the Congressional purpose. *Mitchell v. De Mario Jewelry Inc.*, 361 U.S. 288 (1960), was a suit pursuant to a provision of the Fair Labor Standards Act giving the district courts jurisdiction "to restrain violations." The Supreme Court held that the court could not only enjoin an employer from dismissing an illegally discharged employee (by ordering reinstatement) but could also, in the same proceeding, order reimbursement for loss of wages caused by the unlawful discharge rather than require such relief to be obtained in an independent proceeding. In *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962) the court ordered reimbursement even though it found reinstatement to be inappropriate in the particular case.

The same principles of economy and efficiency argue for a construction of section 20 in accordance with appellant's contention.

B. Only the Court Below Can Fully Dispose of the Appellant's Cause. Furthermore, It Is Familiar With the Entire Setting, and It Is the Most Convenient Forum for the Parties.

Unless the District Court carries out the statutory plan and performs the section 20 function, as Judge Walsh did in *Aratani, supra*, it is highly probable that section 20 problems arising out of this suit will reach the courts again, perhaps in more than one district. All the pieces are before the District Court now; it will be virtually impossible to put them together again, elsewhere.

Since section 20 TWEA bars the receipt of a fee which is not approved in a section 20 proceeding, any judgment rendered for the appellant in any other court, here or abroad, would have to be conditional on the outcome of the court's section 20 determinations. Only the court having the authority to make the section 20 determinations can fully dispose of the appellant's claims. Therefore, if the appellant were able to bring an independent action against Interhandel in our District Court, that action probably would be consolidated with the main action herein; suit brought in another district, if such were possible, would probably be transferred here and consolidated.

As a practical matter, appellant probably cannot obtain an adjudication on the merits other than by intervention here. He cannot otherwise obtain personal or *quasi in rem* jurisdiction of Interhandel in the United States. A petition pursuant to section 20 TWEA in the District of Connecticut, where appellant resides, provides no remedy. It is in form a suit against the Attorney General for an order authorizing fees in excess of ten percent. It could not result in a judgment against Interhandel, or against the fund, unless Interhandel were to appear or intervene voluntarily. The Department of Justice has indicated that it does not intend to follow the procedure of section 32(f)

of the Trading with the Enemy Act, 60 Stat. 925, 50 U.S.C. App. 32(f), which would give American creditors an opportunity to attach, and that it does not consider that the funds are subject to attachment under section 30 of the Trading with the Enemy Act, 45 Stat. 275, 50 U.S.C. App. 30. But Congress indicated, by those two sections, its intention that even general creditors, citizens or residents of the United States, have a chance to be satisfied out of vested property before it is paid over and removed abroad.[1] Appellant's position is stronger, for his claim grows out of the very recovery that is the subject of the main action.

In *Rashap v. Brownell*, 229 F.2d 193 (2nd Cir. 1956) the claimant had similar problems, and the Court of Appeals for the Second Circuit resolved them so as to ease procedural obstacles to his recovery. A former officer of a vested corporation brought an action against the Alien Property Custodian to recover compensation for custodial services rendered in connection with the property. The property claimant intervened as a defendant, and the plaintiff sought leave to file a cross-claim against this intervener, like Interhandel in this case, an alien corporation. The District Court granted summary judgment dismissing the original claim, and refused to permit the cross claim as well. On appeal it was held that the District Court had abused its discretion in refusing to permit the cross-claim, even though the main action was concluded and the court had nothing more to do in it. Judge Clark said:

> "And if there should turn out, as is perhaps vaguely suggested, some unexplored questions of obtaining

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[1] The Congressional Committee Report on section 32(f) states:

> "[Section 32(f)] is designed to permit American creditors to attach property about to be returned before it leaves the country. It resembles section 30 of the 1917 Trading with the Enemy Act (as amended by the Settlement of War Claims Act of 1928), which performed a similar function." H.R. Rep. 1269, 79th Cong. 2nd Sess., 1945, at 1946 U.S. Code Cong. Serv. 1107.

> jurisdiction over the defendant intervener [in the position of Interhandel in the case at bar] in some later action (as to which of course we express no opinion) these but suggest additional grounds why the property should not be adjudicated to and taken by the intervener until the services expended in its conservation are compensated to any or whatever extent found legally deserving." (229 F.2d at 196)
>
> * * *
>
> "Indeed, as it seems to us, the Government (as well as everyone else interested, not excluding the Court) will gain by a final determination of this litigation without the possibility of later claims by attachment or other litigation directed against the fund." *(Id.* at 197)

It is not unfair or improper for the appellant to seek an adjudication of his claims on the merits in this forum.[2] On the contrary, it serves the convenience of Interhandel, the Government, and all of the interveners. It is no imposition on the court; the court exists to adjudicate. The recovery which the appellant helped to make possible, and out of which he was promised payment, see Complaint, JA 10, is the subject matter of the action. There is no effort here to subject

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[2] In 1949, Remington Rand, Inc., alleging a contract with Interhandel to buy the GAF shares once they were returned, was permitted to intervene to protect its interest against an impending settlement which would have prevented Interhandel's performance. Interhandel sought a writ of prohibition in this Court to prevent the intervention, but failed. Remington Rand's complaint sought an affirmative judgment for the shares. There was a full trial on the merits and it was dismissed because Remington Rand failed to prove the existence of the contract. See, in the record on appeal, Motion of Remington Rand, Inc. for leave to intervene, filed May 19, 1949; Amended motion of Remington Rand, Inc., filed June 3, 1949; Order granting motion of Remington Rand, Inc. for leave to intervene and file a complaint, filed October 18, 1949, Holtzoff, J.; Intervening complaint of Remington Rand, Inc. filed October 18, 1949; Memorandum opinion of Pine, J. filed March 31, 1950; Findings of fact and conclusions of law, Pine, J., filed April 26, 1950; Judgment dismissing Complaint of Intervention of Remington Rand, Inc., Pine J., Filed April 26, 1950.

Interhandel to a liability unrelated to the main claim that Interhandel itself submitted for adjudication.

Both of applicant's claims for relief are governed by domestic, not Swiss, law.[3] The judge sitting on the case below is fully familiar with the setting of the controversy and its long and involved history. No other court can adjudicate appellant's claims as intelligently or expeditiously and, therefore, as justly.

II. Appellant's Cause Meets the Requirements for Intervention of Rule 24 F.R.C.P.

A. The Appellant Should Have Been Permitted To Intervene of Right Under Rule 24 (a) (2) F.R.C.P. Because He May Be Bound by the Section 20 Determinations.

In the case at bar, once the determinations under Section 20 are made, either by approving an aggregate of fees under ten percent or, if the fees claimed total more than ten percent, by approving the amount of each fee, appellant cannot bring an independent action to have them redetermined.

Appellant thus is in the situation of interveners in the recent case of *Atlantic Ref. Co. v. Standard Oil Co.*, 113 App. D.C. 20, 304 F. 2d 387 (1962). Standard Oil brought an action against the Secretary of the Interior for a declaratory judgment invalidating a section of an Oil Import Regulation. The result of such a judgment would have been to increase import quotas for Standard and other large integrated companies, and reduce quotas for smaller companies. This Court permitted the smaller companies to intervene. In conven-

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[3] The first claim for relief states a unilateral contract which was performed in New York. The second claim sounds in quasi-contract, and New York is the place where the benefit was conferred. In both instances, the law of New York would govern. A.L.I., Rest. of Conflicts (1934), §§ 323, 332, 452.

tional litigation, the Court said, the test is whether the applicant will be bound by the judgment under the doctrine of *res judicata*. But where a judgment would result in substantial injury to the applicant and the applicant would have no remedy against its effects, the judgment to him is as final and conclusive as if he were bound by it under the doctrine of *res judicata*, and he is entitled to intervene under Rule 24(a) (2). Thus, in *Atlantic Refining*, the *res judicata* test was not regarded as controlling because the applicants could not later have brought an independent action to have the regulation adjudged valid.

Similarly in this case, the section 20 determinations of the court below, from the point of view of appellant here, will be "as final and conclusive to [him] as if [he] were bound by [them] under the doctrine of *res judicata*." (304 F.2d at 394). Also, see *Textile Workers Union v. Allendale Co.*, 96 App. D.C. 401, 226 F.2d 765, 767-68 *(en banc* 1955), *cert. den. sub. nom. Allendale v. Mitchell*, 351 U.S. 909 (1956).

Indeed this Court has gone much further than to say that in circumstances like the present, one standing in appellant's position may intervene as of right. In *Ducker v. Butler*, 70 App. D.C. 103, 104 F.2d 236 (1939), a statute appropriated a sum to compensate a number of Ute Indian bands for lands taken. It also authorized payment of attorneys' and agents' fees as the Secretary of the Interior should deem reasonable, but not to exceed ten percent of the appropriation. Certain fee claimants sued for an apportionment. The court affirmed the dismissal of the suit for failure to join the estate of a deceased attorney which would also have had an interest in the fund. It held that this claimant was an indispensable party and that failure to bring it into the action destroyed jurisdiction. That result goes far beyond what appellant is seeking here.

The appellant may also be bound by the section 20 proceeding in

the sense that approval of his fees under section 20 is essential to his recovery of those fees in any forum. The final sentence of section 20 makes the acceptance or retention of a fee "in excess of an amount approved hereunder" a criminal offense. In *Fontheim v. Legerlotz*, 102 N.Y.S. 2d 847 (Sup. N.Y. 1951), an attorney obtained an administrative return for his client and, as section 20 then required, the Alien Property Custodian approved the amount of the attorney's fee as "fair compensation for the services rendered." Later the attorney brought an action against his former client in a New York court alleging a fraud: that the client had misrepresented that the value of the property he sought was $400,000, when actually it amounted to over one million dollars. The attorney alleged that he and his client had agreed upon a fee of $9,000; that had the attorney known the truth, he would have required $16,000, and the Custodian would have approved it. The Court granted a motion to dismiss on the ground that recovery in the New York action would amount to receipt of a fee in excess of that approved by the Alien Property Custodian and would be a violation of section 20.

The 1956 amendment of section 20 does not diminish the force of the *Fontheim* case. Before that amendment, each fee had to be approved by the Custodian, no matter what the aggregate of fees. Now, only if the total of fees claimed exceeds ten percent of the recovery must the court or Custodian, as the case may be, consider fees individually. But it remains true that even where the aggregate of fees is below ten percent, the court must determine that fact, and that there is no further occasion for the exercise of his reviewing authority. He thus approves the fee schedule in some sense. Moreover, if the aggregate of fees claimed exceeds ten percent and the court must approve each fee individually, a subsequent claimant will be in the identical position of the plaintiff in *Fontheim*. We do not yet know whether that will be the case, but it is clear that appellant here "may

be bound" by the determination under section 20 just as was the plaintiff in *Fontheim v. Legerlotz*.

It is enough, under Rule 24(a) (2), that appellant "may be" bound by the judgment. This requirement for intervention of right is to be liberally and practically construed. See *Kozak v. Wells*, 278 F.2d 104, 110-111 (8th Cir. 1960).

B. The Appellant Should Have Been Permitted To Intervene of Right Under Rule 24 (a) (3) F.R.C.P. Because He Will Be Adversely Affected by the Disposition of Property Which Is Subject to the Control of the Court.

In the present context, the word "property" as used in Rule 24(a) (3) means the vested property or the proceeds of its sale. It is within the control of the court within the meaning of Rule 24(a) (3) and will be disposed of in this suit.

This was the holding in *International Mortgage and Investment Corp. v. Von Clemm*, 301 F. 2d 857 (2nd Cir. 1962). Chief Judge Lumbard said:

> "Plainly the property is not in the 'custody' of the court since it is retained by the Office of Alien Property. We think, however, that property so held is 'subject to the control or disposition of the court.' So far as *Societe Internationale v. McGrath, (McGranery)*, 17 F.R. Serv. 394 (D.C.D.C. 1952) is to the contrary, we disagree:
>
> "Rule 24(a) (3) is an outgrowth of historic equity practice permitting a stranger to assert a claim to property *in custodia legis*, see 4 Moore, Federal Practice, Para. 24.03. This provision as originally enacted referred only to property 'in the custody of the court * * * ' but it was in 1946 amended, 329 U. S. 853, to comprehend property 'subject to the control or disposition of the court * * * ' The 1946 amendment was intended to cover 'the situation where property may be in

> the actual custody of some other officer or agency — such as the Secretary of the Treasury — but the control and disposition of the property is lodged in the court wherein the action is pending.' Notes of Advisory Committee on Amendments to Rule 24, Federal Rules of Civil Procedure, 28 U.S.C.
>
> "Section 9(a) of the Trading with the Enemy Act specifically provides that upon institution of suit, the property which is the subject of the action 'shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States' until the termination of the action. The last paragraph of § 12 of the Act specifically requires the property to be paid over in accordance with the final adjudication of the court. That these provisions subject the vested property to the 'control or disposition' of the district court we have no doubt. Accordingly appellants also have a right to intervene pursuant to Rule 24(a) (3)." (301 F.2d at 862-63).

Societe Internationale v. McGrath, 17 F.R. Serv. 394 (D.C.D.C. 1952) (not otherwise reported), concerned with the intervention of the Attenhofer group in this case, is not a holding to the contrary. The Special Master allowed intervention without a basis in Rule 24 because it seemed proper, on the authority of *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941). Although he said that the property was not in the control of the court for the purpose of Rule 24(a) (3), this was dictum, for he *did* allow intervention. The Court of Appeals in *Von Clemm* addressed itself directly to the Master's dictum:

> "*Societe Internationale v. McGrath* (McGranery), apparently reads Rule 24(a) (3) as requiring that property be subject not only to the disposition of the court but also to the court's 'control.' Even under

> this reading, however, the decision gave a far more restrictive interpretation to the 'control' requirement than it has been accorded in other cases, most of which are subsequent to this decision. See, e.g., *Sutphen Estates v. United States*, 342 U.S. 19, 22, 72 S. Ct. 14, 96 L. Ed. 19 (1951); *Peckham v. Ronrico Corp.*, 211 F.2d 727 (1 Cir. 1954); *Peckham v. Family Loan Co.*, 212 F.2d 100 (5 Cir. 1954); *Clark v. Sandusky*, 205 F.2d 915 (7 Cir. 1953); *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9 Cir. 1960)." (301 F.2d at 862, n. 4).

Since appellant will be bound by the section 20 determinations herein, he is, *a fortiori*, "so situated as to be adversely affected by a distribution or other disposition of [the] property." *International Mortgage and Investment Corp. v. Von Clemm, supra*, 301 F.2d at 862. Looked at another way, he would be adversely affected because a determination under section 20 is analogous to an *in rem* proceeding: a limited amount is to be divided among claimants to it.

Wholly apart from the technically binding character of the determination, once the property leaves the control of the court, appellant would be remediless as a practical matter. See point I.B., p. 19-20 of this brief. Claims asserted and allowed thereafter would be Pyrrhic victories. Nothing could more clearly constitute the adverse effect contemplated by Rule 24(a)(3). This was the ground of Remington Rand's motion to intervene in 1949, which was granted. See footnote 2 at p. 21.

C. The Court Below Failed To Consider Appellant's Grounds for Permissive Intervention: That Appellant's Claims Present Questions of Law and Fact in Common With Those Which Must Be Decided in the Section 20 Proceeding.

The appellant's cause brings on for adjudication many of the issues of section 20's interpretation and application that are likely to arise in this action: What will be the dollar amount of the ten percent

limit? What fees are properly included? Does the aggregate of fee claims exceed the limit? How reasonable is each fee, including appellant's? Are there special circumstances of unusual hardship which warrant the Court in permitting an aggregate of fees greater than the limit? What adjustments, if any, should the Court make in each of the fees? Having heard the evidence in a trial of appellant's cause, the court will not again have to hear the same matter in determining the reasonableness of the amount of appellant's fees.

Furthermore, permissive intervention is appropriate to avoid multiplicity of suits and settle related controversies in a single action.

The court below did not review all these matters and then, in a considered exercise of discretion, deny permissive intervention. On the contrary, nothing in the court's opinion gives any indication that it addressed these issues at all. Failure to do so is an abuse of discretion, even if a proper exercise of discretion to dismiss the motion under Rule 24(b) would have been sustained.

CONCLUSION

For the foregoing reasons, the order below should be vacated and the court instructed to permit appellant to intervene and to adjudicate the issues raised by the third party complaint. At a minimum the District Court should reserve decision on appellant's motion pending its decision whether or not to enter a consent judgment in the main case.

Respectfully submitted,

ROBERT M. HAUSMAN
One Farragut Square South
Washington, D. C. 20006
Counsel for Appellant

DAVID GINSBURG
HAROLD LEVENTHAL
Of Counsel

INDEX TO SUPPLEMENT

* See 228 F. Supp. 706 (1964)

[Filed March 11, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE T. ARATANI, et al.,
Plaintiffs

v.

ROBERT F. KENNEDY, Attorney General of the United States
Defendant

Civil Action No. 3164-58

KYUICHI SUMIYOSHI, et al.,
Plaintiffs

v.

ROBERT F. KENNEDY, Attorney General of the United States

Civil Action No. 3228-58

KINZUCHI SHIGENO, et al.,
Plaintiffs

v.

ROBERT F. KENNEDY, Attorney General of the United States
Defendant.

Civil Action No. 1176-59

PETITION FOR THE ALLOWANCE OF ATTORNEYS' FEES

To the Honorable Leonard P. Walsh, Special Judge.

The petition of Thomas H. Carolan, Philip W. Amram, Roger E. Brooks and James P. Parker respectfully represents:

Petitioners are counsel for various of the plaintiffs in the three above captioned actions. Petitioners jointly with the Department of

Justice have filed with the Court a Joint Motion for the Approval of Compromise of the three above captioned actions. Reference is made to that Joint Motion for the details of the compromise.

2. As set forth in the Joint Motion, the terms of the compromise include provisions for the fixing by this Court of the attorneys' fees to be paid to Petitioners out of this fund for their services in the three above captioned matters in the creation of this fund for distribution.

3. These matters go back as far as 1947 and the results of the services of Petitioners have created for the clients a fund of $1,213,808.44, which is the maximum fund which could be created hereafter if the litigation were carried to its ultimate conclusion. The said fund was created solely as the result of the services of Petitioners, and in the absence of such services, no fund would exist except the relatively minor sum of $55,000.00, including interest, which was awarded to the plaintiffs by the Office of Alien Property.

4. Attached hereto are memoranda setting forth the services rendered by Petitioners and their associates in California and Hawaii to the respective plaintiffs.

5. Section 20 of the Trading with the Enemy Act, as amended, authorizes this Court to approve attorneys' fees in excess of 10% of the amount paid when there exist "special circumstances of unusual hardship". The administrative proceedings before the Hearing Examiner since 1947 requiring the development of complicated facts and protracted and difficult litigation in this Court and in the United States Court of Appeals for the District of Columbia Circuit and in the Supreme Court of the United States clearly constitute special circumstances within the meaning of the statute such as to warrant the award of attorney fees in an amount equal to 20% of the amount the defendant has agreed to pay plaintiffs.

6. Petitioners believe that a fee of 20% of the fund, created by the services of Petitioners, as set forth in the annexed memoranda, is fair and reasonable and appropriate under all circumstances.

7. Petitioners have agreed among themselves upon the division of fees between them. Upon the entry by this Court of an Order awarding a fixed amount for fees, Petitioners will furnish the Office of Alien Property with instructions for the appropriate amount to be paid to the order of Messrs. Carolan and Amram and the appropriate amount to be paid to the order of Messrs. Brooks and Parker.

WHEREFORE, Petitioners pray your Honorable Court for an order allowing and awarding Petitioners attorneys' fees in the amount of 20% of the fund for distribution, i.e. the sum of $242,761.68.

/s/ Thomas H. Carolan
/s/ Philip W. Amram
Attorneys for Plaintiffs in
Aratani and Shigeno

/s/ Roger E. Brooks

/s/ James P. Parker
Attorneys for Plaintiffs in
Sumiyoshi

Defendant will not object to any fee allowance which does not exceed 20% of the amount payable under the compromise settlement.

/s/ Armand DuBois
Attorneys for Defendant

[Filed March 17, 1964]

INTERLOCUTORY ORDER APPROVING COMPROMISE AND AWARDING ATTORNEYS' FEES

The above causes came before this Court for oral hearing on March 9, 1964, on the Joint Motions of Plaintiffs and Defendant for Approval of Compromise and on the Petitions of Plaintiffs' Counsel for the allowance of attorneys' fees. Prior to the oral hearing counsel had submitted in writing, and the Court had considered, the petitions setting out the reasons for the compromise by the respective parties, the proposed notices to the claimants, and voluminous certified narrative statements as to the services rendered by the respective attorneys.

The Court now makes the following findings of fact:

1. These actions are brought under Section 34(f) of the Trading with the Enemy Act, as amended (50 U. S. C. App. 34(f)), to review the defendant's Final Schedules of debt claims allowed with respect to the insolvent estates of the Sumitomo Bank, Ltd. and the Yokohama Specie Bank, Ltd., so far as they relate to the partial dismissal of 2,963 debt claims based on yen deposits.

2. A compromise settlement of these actions has been agreed upon whereby the Office of Alien Property will pay to class plaintiffs and their counsel the total sum of $6,395,357.56, of which $1,213,808.44 will be derived from account of the Sumitomo Bank, Ltd. and will be paid to the Sumitomo Bank, Ltd. class plaintiffs and their attorneys, and $5,181,549.12 will be derived from the accounts of the Yokohama Specie Bank, Ltd. and will be paid to the Yokohama Specie Bank, Ltd. class plaintiffs and their attorneys. Of the above sum the Office of Alien Property will pay directly to claimants' counsel attorneys' fees as fixed by this Court. The defendant has undertaken not to object to any fee arrangement which does not exceed 20 per centum of the amount payable. After the deduction of attorneys' fees the balance remaining will be divided pro-rata among the Sumitomo Bank, Ltd. plaintiffs and the Yokohama Specie Bank, Ltd. plaintiffs. Pro-rata

payments owed to claimants or their heirs who cannot be located by the Office of Alien Property or by the plaintiffs' counsel by January 1, 1965 will be covered by the Attorney General into the Treasury for deposit in the War Claims Fund, pursuant to Section 39 of the Trading with the Enemy Act, as amended, 50 U. S. C. App. 39.

3. Based upon the representations made by counsel for the Department of Justice and counsel for the claimants, and in view of the long history of the litigation, including the administrative hearings, legislation submitted to Congress, and the legal proceedings in the United States District Court, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States, the Court finds the compromise settlement is reasonable and fair, and to the best interest of all parties.

4. The history of this litigation, beginning with the claims made in 1947 and continuing through this date, reflects unusual hardship. Counsel for the Department of Justice have represented there will be no objection to the award of any aggregate of fees which does not exceed 20 per centum. The Court finds that the special circumstances of unusual hardship have been established in this case, which requires the allowance of fees in excess of 10 per centum.

Accordingly, it is by the Court this 17th day of March, 1964,

ORDERED:

1. That the proposed compromise is approved pursuant to Rule 23(c) of the Federal Rules of Civil Procedure.

2. That in accordance with Section 20 of the Trading with the Enemy Act, attorneys' fees amounting to an aggregate of 20 per centum of the sums to be paid by the Office of Alien Property are awarded to plaintiffs' attorneys as follows:

a) To Thomas H. Carolan, Philip W. Amram, Roger E. Brooks and James P. Parker, attorneys of record for plaintiffs, the sum of $242,761.69 from the Sumitomo Bank, Ltd. account in the Office of Alien Property; that proper distribution of this fee shall be made by

said counsel of record to all other counsel who have participated in this case and who have claims for counsel fees pending; and

b) To Thomas H. Carolan and Philip W. Amram, attorneys of record for plaintiffs, the sum of $1,036,309.82, from the Yokohama Specie Bank, Ltd. account in the Office of Alien Property; that proper distribution of this fee shall be made by said counsel of record to all other counsel who have participated in this case and who have claims for counsel fees pending.

3. Counsel for plaintiffs are directed to give notice of this Interlocutory Order to all parties by regular air-mail addressed to the last known address of each party, informing them that a Final Hearing will be held before the undersigned on the 27th day of April, 1964, at which time they may appear personally or by counsel if they wish to oppose the compromise or the award of attorneys' fees; or that they may notify the United States District Court for the District of Columbia, Washington 1, D. C., in writing, prior to the hearing date of April 27, 1964, of their objections and the reasons therefor.

4. This Interlocutory Order will not become final until the entry of judgment after the hearing directed in paragraph 3 immediately above.

/s/ Leonard P. Walsh
Judge

Attorneys:

Thomas H. Carolan, Esq. and Philip W. Amram, Esq., Washington Building, Washington, D. C.
Attorneys for Plaintiffs in the *Aratani*, *Shigeno* and *Abe* cases

Roger E. Brooks, Esq., 923 - 20th Street, N. W., Washington, D. C.
James P. Parker, Esq., 1028 Connecticut Ave., N. W., Washington, D. C.
Attorneys for Plaintiffs in the *Sumiyoshi* case

Armand DuBois, Esq., Department of Justice, Washington, D. C.
Attorney for Defendant

[Filed May 18, 1964]

MEMORANDUM AND FINAL ORDER

The above causes came before this Court for hearing on March 9, 1964, on the joint motions of plaintiffs and defendant for approval of a compromise of a class action pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and for allowance of counsel fees. Subsequently, on March 17, 1964, an Interlocutory Order approving the compromise and awarding the counsel fees was signed. This order directed counsel for plaintiffs to give written notice of the proposed compromise and the proposed counsel fees to all 2,963 claimants. The order further provided that a final hearing on these matters would be held on April 27, 1964, and that any interested party could object to the proposed settlement and fees, either in writing or by appearing in person or by counsel.

The compromise agreement was arrived at by counsel for the Office of Alien Property and counsel for the claimants. The parties then came before this Court and petitioned for approval in accordance with the Federal Rules of Civil Procedure. Counsel did not participate in any of the compromise negotiations before the Court, the tentative agreement having been achieved before the Supreme Court entered its Order, dated March 2, 1964, referring the causes to this Court for the approval of a compromise settlement.

Subsequent to the filing of the petition and prior to the issuance of the Interlocutory Order on March 17, 1964, this Court was satisfied that the proposed agreement was in the best interests of all the parties. However, the Court went beyond the mandatory requirements of Rule 23(c) and required notice by mail to all of the claimants.

Counsel for plaintiffs mailed copies of the Interlocutory Order, along with an explanatory letter, to each of the 2,963 claimants on March 18, 1964. The letter and the order each explained that the claimants should communicate written objections to the Court prior to April 27, 1964.

The Court received three letters setting out objections to the award of counsel fees. Two of these stated that the twenty per cent award was excessive. The claims of these two parties amount to a total settlement of $5,010.36. The third letter stated that the original agreement was for a fee of 10 per cent; this claimant will receive a settlement of $2,425.20.

These objections must be considered in the light of the 2,960 other claims and the total amount of $6,395,357.56. It should also be noted that the three claimants who now oppose the award of counsel fees would have received a total of $169.15 on the original schedule from the Office of Alien Property. Under the agreed settlement they will receive a total of $7,435.56, due primarily to the efforts by their counsel.

The Court received only one objection to the settlement, and this was from a claimant whose claim was previously disallowed by the Office of Alien Property. In addition, the Court received ten other written inquiries concerning other claims, which had been previously disallowed, changes of address, and other questions relating to the claims.

Affidavits filed by counsel for plaintiffs state that notices have been mailed to all claimants. Counsel further stated for the record that two hundred and fifty-five (255) notices from the first mailing were returned by the post office for various reasons. New addresses have been obtained for many of these claimants and counsel for both parties are continuing in their efforts to contact all claimants.

In addition to the notice by mail, counsel have also obtained publication in at least seven newspapers, in either English or Japanese, in the locales in which a majority of the claimants reside.

The affidavit filed by counsel for plaintiffs states that they have received more than one hundred and forty (140) letters from the claimants. Eighty-eight (88) of these gave a change of address, fifteen (15) notified counsel of the death of claimants, and thirty-seven (37)

indicated approval of the proposed settlement and counsel fees. Counsel did not receive any objections to the compromise settlement or the amount of the counsel fees.

Immediately prior to the final hearing, a written objection to the allowance of counsel fees was filed by an attorney from Los Angeles, California. His objection was based on the representation that he was retained by five of the claimants in 1940, that he filed their claims and is entitled to compensation. A response was filed by counsel of record, and thereafter that attorney filed a declaration under oath stating that in view of all the facts he believes that he is not, nor ever was, entitled to any fee allowed to counsel of record by this court.

As a result of this claim, the Court inquired as to the possibility of fees owed to other counsel, who at one time or other participated in claims on behalf of the parties. Mr. Thomas H. Carolan, one of the attorneys for the claimants, undertook a search of the records, and informed the court that there is a possibility that other counsel are entitled to nominal fees from the amount allowed. Mr. Carolan represented to the Court that he and his associate counsel of record are prepared to pay, and will pay, attorneys who filed retainer agreements with the Office of Alien Property prior to March 17, 1964.

On May 1, 1964, Mr. Carolan wrote to all other attorneys listed on the claims of record, and requested that they inform him of any fees to which they may be entitled.

In the Interlocutory Order of March 17, 1964, this Court stated that counsel of record would be responsible for all fees due to other counsel in that ". . . proper distribution of this fee shall be made by said counsel of record to all other counsel who have participated in this case and who have claims for counsel fees pending. . .". This Court is of the opinion that the burden of distribution of the fees should be with the counsel of record. Thirty-three attorneys have participated directly in the actions and the four principal attorneys have agreed on the distribution with those attorneys. This Court is not in a position to

equitably rule on the distribution of the fee in that the attorneys are the only ones able to know the amount of work and time expended by themselves. This is also true as to other attorneys who may have worked on various claims during the past seventeen years.

The Court is satisfied that a diligent effort has been made to locate and inform all attorneys who may have performed services in these actions. The Court will therefore rely on the principal attorneys to make any further distribution of attorneys' fees which are just and reasonable. The Court will not delay payment to the claimants of these funds which have been so long in litigation.

This Court is also of the opinion that the three objections to counsel fees which were submitted by claimants to the court are without merit. The record before the Court summarizes the services performed by counsel during the seventeen years these cases have been in litigation, and the twenty per cent award appears to be adequately justified under the unusual hardship provision of Section 20 of the Trading with the Enemy Act (50 U. S. C. App. 20). Furthermore, counsel for the Government, in approving the proposed compromise, agreed that they would offer no objection to an aggregate of fees which does not exceed twenty per cent.

ORDER

Accordingly, it is this 18th day of May, 1964,

ORDERED, that the Interlocutory Order of March 17, 1964, be, and the same hereby is, made final, except that the word "pending" is hereby stricken from the last line of page 3 and at the end of the first paragraph of page 4 of the Interlocutory Order; and the Office of Alien Property is directed to proceed with the payments to the respective claimants in accordance with the compromise agreement; and

IT IS FURTHER ORDERED, that the Office of Alien Property promptly pay attorneys' fees to counsel of record as follows:

(a) from the Sumitomo Bank Ltd. Account to Roger E. Brooks and James P. Parker the sum of $42,880.00; and they, in turn, shall make distribution of a proper share to Shiro Kashiwa of Kashiwa and Kashiwa, and to any other attorneys with whom the said Roger E. Brooks and/or James P. Parker may have contractual agreements for a share of said fee, but whose names have not been included in the schedules annexed to the Petition for Allowance of Attorneys' Fees; and

(b) from the Sumitomo Bank, Ltd. Account to Thomas H. Carolan and Philip W. Amram, the sum of $199,889.69; and they, in turn, shall make distribution of a proper share to Alfred Gitelson and to any other attorneys with whom the said Thomas H. Carolan and/or Philip W. Amram may have contractual agreements for a sharing of said fee, but whose names have not been included in the schedules annexed to the Petition for Allowance of Attorneys' Fees; and

(c) from the Yokohama Specie Bank Account to Thomas H. Carolan and Philip W. Amram the sum of $1,036,309.82; and they, in turn, shall make distribution of a proper share to Alfred Gitelson and to any other attorneys with whom the said Thomas H. Carolan and/or Philip W. Amram may have contractual agreements for a sharing of said fee, but whose names have not been included in the schedules annexed to the petition for Allowance of Attorneys' Fees.

IT IS FURTHER ORDERED, that Defendant, following final payment to the class plaintiffs and to counsel, pursuant to the Order of March 17, 1964, and this Order, shall inform the Court to that effect, and present an appropriate order.

/s/ Leonard P. Walsh
Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18939

ROBERT A. SCHMITZ,

Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Societe Internationale Pour Participations Industrielles et Commerciales, S.A. (Interhandel).

Appellee.

JOINT APPENDIX

INDEX

DOCKET ENTRIES

DATE		PROCEEDINGS
1963	Oct 14	Joint Motion to Fix a Date for Interveners to Appear and for Movant to Submit Proposed Consent Order. Filed.
	Oct 17	Memorandum Denying Joint Motion to Fix a Date for Interveners to Appear and for Movant to Submit Proposed Consent Order (N) Pine, J.
	Dec 20	Stipulation of Settlement . . . Joint Motion of Defendants and Plaintiff for Publication of Motion and for Other Purposes. Filed.
1964	Feb 7	Supplemental Memorandum of Defendants and Plaintiff in Support of Joint Motion filed December 20, 1963. Filed.
	Feb 27	Second Supplemental Memorandum of Defendants and Plaintiff. Filed.
	Mar 3	Memorandum Granting Portions of "Joint Motion" (N) Pine J.
	Apr 8	Supplementary Agreement Between Plaintiff and the Attorney General, Filed.
	Apr 15	Findings of Fact and Conclusions of Law Relating to Motion to Dissolve Injunction Entered on Jan 2, 1960. Pine J.
	Apr 15	Consent order . . . [see order] Pine J.
	May 7	Motion of Robert A. Schmitz for leave to intervene as Plaintiff, etc. Filed.
	June 30	Memorandum Opinion in re: Denying Motion of Robert A. Schmitz for an Order Joining Him as a Party Plaintiff or for Leave to Intervene as Plaintiff . . . (N) Pine, J.
	June 30	Order Denying Motion of Robert A. Schmitz for Joinder or Intervention as a Plaintiff (N) Pine, J.
	Aug 28	Notice of Appeal by Robert A. Schmitz . . . Filed.

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4360-48

SOCIETE INTERNATIONALE, etc. (INTERHANDEL-I.G. CHEMIE), *et al.*, *Plaintiffs*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, etc., *et al.*, *Defendants*

STIPULATION OF SETTLEMENT (DECEMEBER 20, 1963) AS AMENDED BY SUPPLEMENTARY AGREEMENT (MARCH 25, 1964)

REPRINTED AS OF APRIL 15, 1964

(All footnotes are explanatory only, and are not part of Stipulation.)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C

[Excerpt from original Stipulation of Settlement filed December 20, 1963]

Section XIII

"In order to implement the provisions of this Stipulation, the parties to this Stipulation agree to take the following actions before the United States District Court for the District of Columbia.

"* * *

"4. Interhandel shall submit to the Court satisfactory evidence that the aggregate of all fees paid and to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered or to be rendered to Interhandel and to the Consenting Intervenors, in connection with any payment made or judgment entered pursuant to this Stipulation, does not exceed the limit imposed by Section 20 of the Trading with the Enemy Act, as amended."

[Excerpt from Stipulation of Settlement dated December 20, 1963 as amended by Supplementary Agreement dated March 25, 1964]

SECTION XIII: PROCEEDINGS BEFORE THE DISTRICT COURT

In order to implement the provisions of this Stipulation, the parties to this Stipulation agree to take the following actions before the United States District Court for the District of Columbia.

* * *

4.* Interhandel shall submit satisfactory evidence, as required by Section 20 of the Trading with the Enemy Act, as amended, that the aggregate of all fees paid and to be paid to all agents, attorneys at law or in fact or representatives for services rendered or to be rendered to Interhandel and to the Consenting Interventors, in connection with any payment made or judgment entered pursuant to this Stipulation, does not exceed the limitation imposed by said Section.

[Schedule E to the Stipulation of Settlement dated December 20, 1963 as amended March 25, 1964.]

SCHEDULE E*

[Caption to be Supplied]

Consent Judgment

This cause came on to be heard this day of , 196 , upon the joint motion of the Plaintiff and the Defendants. It appears to the Court that the Plaintiff and the Defendants have consented to the entry of this Consent Judgment without the taking of any evidence and without adjudication of any issue of law or fact, and without any determination by the Court whether it is fair, just or equitable to the parties involved. It further appears to the Court that this Court has jurisdiction over the subject matter of this Action and over all parties to this Action.

Now, then, it is this day of , 196 ,
ORDERED, ADJUDGED AND DECREED:

That the Plaintiff, Societe Internationale [etc.] have and recover of the Defendants judgment in the sum of $, payable in accordance with the terms of the Stipulation of Settlement filed in this action on December 20, 1963, and of the Supplementary Agreement filed in this action on April 8, 1964, and without interest except as provided in said Stipulation.

District Judge

We Consent:

Counsel for the Defendants

Counsel for Interhandel **

* As amended by Supplementary Agreement (March 25, 1964).

** This Schedule is referred to in Section XIII, paragraph 5 hereof.

5.* They shall, as soon as practicable after the sale described in Section V of this Stipulation shall have been consummated, determine the total amount of money to which Interhandel shall be entitled pursuant to paragraph 4 of said Section V, and shall prepare and present to the District Court a consent judgment, in substantially the form annexed as Schedule E to this Stipulation, giving judgment in favor of Interhandel in such sum; *Provided,* That payment by the United States of the amount of such judgment shall be made only in accordance with the provisions of paragraph 4 of Section VIII of this Stipulation; *Provided further,* That if such judgment not be entered, they shall promptly file a praecipe of dismisal of the Action with prejudice.

[Filed, March 3, 1964]

MEMORANDUM TO THE CLERK

The Clerk will inform all counsel that I shall sign an Order, if presented, granting the portions, and none other, of the "Joint Motion" of plaintiff and defendants filed herein on December 20, 1963, as hereinafter set forth:

1. That portion of said motion under heading "1" that the Court find that the compromise of this action, pursuant to the Stipulation of Settlement filed herein on December 20, 1963, as amended, does not require the approval of the Court under Rule 23, Fed. R. Civ. P., because intervenors do not constitute a class within the meaning of the Rule;

2. That portion of said motion under heading "2" that the Court find that the rights of the non-consenting intervenors, who claim about two-tenths of one percent of the total vested GAF shares of stock subject to this litigation, as set forth in Schedule D, as amended, of said Stipulation of Settlement, are not adversely affected by said Stipulation in view of the provisions therein contained for their protection, and in the light of the Amendment in 1962 to §9(a) of the Trading With The Enemy Act, provided said Stipulation is amended as proposed in the second Supplemental Memorandum of defendants and plaintiff filed herein on February 27, 1964.

3. That portion of said motion under the heading "3" for the dissolution of the injunction entered herein on January 26, 1960, and

4. That portion of said motion under heading "4" for the amendment of the injunction issued on February 3, 1949 by substituting for the phrase in paragraphs 1 and 2 thereof "until 90 days after the termination of the subject litigation," the phrase "until 10 days after the entry of judgment in this action upon consent of the Attorney General and Interhandel," provided that the proposed amendment is further amended by the addition of the words, "or upon filing of praecipes of dismissal with prejudice by all the parties including all the intervenors, except those described as non-consenting intervenors in Schedule D, as amended, of said Stipulation."

Provided, further, that the Order granting the portions of the Motion, as aforesaid, and the said Stipulation, and Schedule D, both as amended, shall show on the face of each that it is consented to by all the parties and intervenors, as has been represented to the Court.

Attention of counsel is also directed to certain language in the Stipulation relating to the entry of a judgment (e.g. §V, par. 4, §XIII, par. 5. & 6, and §III, par. 1 e). Whether a consent judgment will be entered is not now before the Court as counsel have stated, but the Court has questioned its necessity and propriety. Counsel might be

well advised to consider whether the Stipulation should not be amended to make it more flexible by adding the words "or dismissal with prejudice" where the word "judgment" alone is used.

/s/ David A. Pine, Judge

March 3, 1964

[Filed, April 15, 1964]

ORDER UPON JOINT MOTION

This cause came on to be heard on the Joint Motion of the Defendants and the Plaintiff filed herein on December 20, 1963, and upon Memoranda and Supplemental Memoranda and Exhibits annexed thereto and upon the Affidavits filed in support of said Joint Motion, and was argued by counsel. The movants having withdrawn the paragraph of their Joint Motion which sought modification of the injunction entered in this action on February 3, 1949, and the Court having made Findings of Fact and Conclusions of Law respecting the paragraph of the aforesaid Joint Motion which seeks dissolution of the injunction entered in this action on January 26, 1960, and, it appearing to the Court:

1. That on April 8, 1964, the Defendants and the Plaintiff filed with the Court a Supplementary Agreement, amendatory of the Stipulation of Settlement filed herein on December 20, 1963, which is in accordance with the Memorandum to the Clerk filed by the Court on March 3, 1964; and

2. That counsel for all Consenting Intervenors have signified their consent to the Stipulation of Settlement as so amended and to the revised Schedules, and to this Order;

Now, therefore, it is this 15th day of April, 1964, ORDERED, ADJUDGED and DECREED:

1. The compromise of this action by the Defendants and the Plaintiff, pursuant to the Stipulation of Settlement, filed with this Court on the 20th day of December, 1963, as amended by the Supplementary Agreement executed as of March 25, 1964, and filed in this action on April 8, 1964, does not require the approval of this Court

under Rule 23, Federal Rules of Civil Procedure, because the Intervenors in this action do not constitute a class within the meaning of that rule.

2. In view of the provisions in said Stipulation of Settlement, as amended by said Supplementary Agreement, for the protection of those Intervenors defined in said Stipulation of Settlement as Nonconsenting Intervenors, and in view of the provisions of Section 203 of Public Law 87-846, enacted October 22, 1962, the rights of said Nonconsenting Intervenors, as intervening plaintiffs in this action, are not adversely affected by said Stipulation, as so amended.

3. The injunction entered in this action on January 26, 1960, be and it is hereby dissolved.

/s/ David A. Pine
District Judge

We consent to the entry of this Order, and to the entry of the Findings of Fact and Conclusions of Law herein referred to.

/s/ Robert E. Sher
Attorney for Kaufman Intervenors

/s/ James J. Bierbower
Attorney for Klingler Intervenors

/s/ Milton D. Stewart
Attorney for Intervenor Carl Marks & Co., Inc.

/s/ Edmund L. Jones
Attorney for Attenhofer Intervenors

/s/ William P. MacCracken, Jr.
Attorney for Intervenor Sperry-Rand

[SEAL]

MOTION OF ROBERT A. SCHMITZ FOR JOINDER OR INTERVENTION AS A PLAINTIFF

Robert A. Schmitz moves, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, for an order joining him as a party plaintiff, or, in the alternative, pursuant to Rule 24(a) and (b) for leave to intervene as a Plaintiff, in order to assert the claims set forth in his proposed complaint, of which a copy is hereto attached, on the ground that those claims are cognizable under section 20 of the Trading with the Enemy Act (50 U.S.C. App. §20), that he is an indispensable party, that he is not adequately represented in this action, that he is or may

be bound by the judgment herein, and that his claims have questions both of law and of fact in common with the main action.

Dated May 7, 1964

Ginsburg and Leventhal
One Farragut Square South
Washington, D.C. 20006
Attorneys for Robert A. Schmitz
Applicant for Joinder or Intervention
/s/ Robert M. Hausman

[Filed, May 7, 1964]

COMPLAINT OF ROBERT A. SCHMITZ, INTERVENER, FOR A MONEY JUDGMENT AND OTHER RELIEF

1. This complaint is brought pursuant to section 20 of the Trading with the Enemy Act (50 U.S.C. App. §20) and Rules 19(a) and 24 of the Federal Rules of Civil Procedure.

2. The stipulation of Settlement entered into by Interhandel, the Attorney General, and the Treasurer of the United States, parties to the main action herein, dated December 20, 1963, as amended March 25, 1964, provides in Section XIII:

> "In order to implement the provisions of this Stipulation, the parties to this Stipulation agree to take the following actions before the United States District Court for the District of Columbia.
>
> *****
>
> "4. Interhandel shall submit satisfactory evidence, as required by Section 20 of the Trading with the Enemy Act, as amended, that the aggregate of all fees paid and to be paid to all agents, attorneys at law or in fact or representatives for services rendered or to be rendered to Interhandel and to the Consenting Interveners, in connection with any payment made or judgment entered pursuant to this Stipulation, does not exceed the limitation imposed by said Section."

3. Interhandel has indicated that it does not intend either to satisfy the claims asserted herein, or to include them among the fees which it will report under Section 20 of the Trading with the Enemy Act.

First Claim for Relief

4. From boyhood Robert A. Schmitz has been associated by family ties or friendship with some of the pre-1959 principals of Interhandel A.G., including its then largest and controlling stockholder, Dr. Hans Sturzenegger. Schmitz's father was the organizer and, until 1942, the president of General Aniline and Film Corporation (hereinafter called "GAF"), an American subsidiary and the principal property of Interhandel. Since the seizure of the GAF stock by the Alien Property Custodian, Schmitz, with the knowledge and approval of Interhandel, has been concerned with the manner in which Interhandel might secure its return, or just payment in lieu of return.

5. Because GAF is a valuable property, and believing that an American corporation would be in a better position than Interhandel to secure return of the GAF stock, a number of American corporations sought to buy Interhandel's interest, and Interhandel entertained the idea. For several years, from 1947 through 1958, Schmitz successively was authorized to act, and did act, on behalf of Remington Rand Inc., Atlas Corporation, Shields and Co., W. R. Grace & Co., and Food Machinery and Chemical Corp., and, in anticipation of substantial fees and commissions, expended a great deal of time, money and effort to bring about such a purchase.

6. In December, 1958, while Schmitz was in Switzerland on behalf of Food Machinery and Chemical Corp., Schmitz was told by Dr. Hans Sturzenegger that Interhandel had finally decided not to sell its interest in GAF but, rather, had decided that it would itself negotiate with the United States Government for return or compensation through an agent of its own choosing, who must be a man of considerable reputation. Schmitz suggested the name of Mr. Charles E. Wilson (hereinafter "Mr. Wilson"), formerly president of the General Electric Company, a high government official, and President of the People to People Foundation. Schmitz was personally acquainted with Mr. Wilson, and suggested his name as "agent" because Mr. Wilson enjoyed wide esteem and could therefore negotiate with the United States Government at the highest levels. Schmitz also advised that Mr. Wilson could be persuaded to act only if he were offered full Trustee powers to negotiate a settlement of the dispute upon

such terms and conditions as would appear honorable and just to him, such powers to be terminable only upon the achievement of the objective. Schmitz's suggestion was accepted, and he was asked to attempt to bring about the trusteeship of Mr. Wilson. Dr. Sturzenegger told Schmitz that if the trusteeship could not be established, he wanted there to be no written record of the plan.

7. During these same meetings with Dr. Sturzenegger in December 1958, Schmitz pointed out that adoption of this new approach would disable him from earning the fees and commissions on the purchase of Interhandel's interest for which he had worked so hard for so many years; that bringing about the Wilson trusteeship would be of great value and importance to Interhandel; and that it would take much time, travel and effort to give Mr. Wilson the necessary background, persuade him that Interhandel's cause was just, and induce him to undertake the trusteeship. For these reasons, Schmitz asked for a fee from Interhandel for bringing about the Wilson trusteeship equal to five per cent of the proceeds to Interhandel of such settlement as Interhandel and the United States Government should reach. Dr. Sturzenegger agreed that Interhandel would pay Schmitz a fee for bringing about the Wilson trusteeship and suggested that two per cent or three per cent would be more acceptable to Interhandel's stockholders. No agreement was reached on that occasion regarding the amount or percentage to be paid to Schmitz.

8. Schmitz then proceeded with his efforts to bring about the trusteeship of Mr. Wilson. From the end of November 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers, a period of 18 months, Schmitz devoted almost all of his time and attention, his own money and a good deal of travel to bringing about the desired result. Without prior understanding, and by way of approval of what Schmitz had done, in May 1960 Interhandel reimbursed Schmitz $13,733.00 for out-of-pocket expenses only. Schmitz's task was extraordinarily difficult. Among other things, it was necessary for Schmitz to, and he did, (1) provide essential background to persuade Mr. Wilson of the factual truth of Interhandel's position in the dispute, (2) convince Mr. Wilson of the good faith and integrity of Interhandel's management, (3) induce Mr. Wilson to accept the feasibility of the trust approach;

(4) prevail upon Mr. Wilson to commit his time, energy and reputation to the effort, (5) bring Mr. Wilson together with Interhandel's owners, managers, and agents, in meetings in New York and Paris, (6) maintain both trust and contact between Interhandel and Mr. Wilson during a change in Interhandel's stock ownership and management, and during a period of publicity which reflected badly upon the good faith of Interhandel's management, (7) give body and substance to the trust idea, and (8) draft a resolution of the Executive Committee of Interhandel's Board of Directors, an option contract, and a Power of Attorney acceptable in form and substance both to Mr. Wilson and to Interhandel. The Resolution, Contract, and Power of Attorney are appended hereto as Exhibits. It is vital also to understand that the plan assumed Mr. Wilson would serve as trustee, and he did so serve, only because he believed in Interhandel's cause and regarded the confiscation as contrary to U.S. interests, illegal, immoral and unwise. Mr. Wilson was to receive no compensation for his services as trustee. The only compensation which Interhandel undertook to pay, therefore, was the compensation to Mr. Schmitz; later Interhandel also paid the Trustee's attorney for legal services rendered to the Trustee.

9. On or about October 26, 1959, Dr. Alfred Schaefer confirmed the arrangement made with Dr. Sturzenegger, and resolved the matter of compensation by agreeing, for Interhandel, to pay Schmitz, for bringing about Mr. Wilson's trusteeship, 5% of any monies which Interhandel should receive in settlement of its dispute with the United States Government, payment to be made when the settlement funds due Interhandel became available. Schmitz did not ask for a writing because of the previous understanding, which Dr. Schaefer reiterated, that there would be no written record of the plan prior to its acceptance by the Trustee.

10. On May 23, 1960, Mr. Wilson accepted the trust powers, and Schmitz promptly communicated the acceptance to Interhandel. Schmitz had and has done everything he was required to do to discharge his obligation under the contract.

11. Mr. Wilson actively, faithfully, and diligently sought to carry out his functions as trustee, and made substantial steps toward the achievement of his objective. However, in the summer of 1961 Inter-

handel, independently of the trustee and without his knowledge, began to deal directly, and through other channels, with U.S. government officials, in violation of the Resolution of Interhandel's Board of Directors' Executive Committee, Interhandel's Option Agreement with Mr. Wilson, and the Power of Attorney Interhandel granted to Mr. Wilson. In August 1961 Interhandel directed the Trustee to suspend negotiations with the U.S. Government. During the fall of 1961, when the Trustee became aware of the direct negotiations between Interhandel and the United States Government, he sought to resign his trusteeship but was requested by Interhandel to remain as Trustee for the purpose of assisting in the reorganization which would follow a settlement. Mr. Wilson formally resigned the trusteeship in November 1962. Although Interhandel frustrated and prevented the possibility of success of the trustee's undertaking, the activities of the trustee contributed to the disposition of the Government to enter into a settlement with Interhandel.

Second Claim for Relief

12. Following Mr. Wilson's acceptance of the trust powers, and from June 1, 1960 through December 31, 1961, Schmitz performed, almost continuously, a great amount of work for Interhandel. This work included assisting, advising, and providing factual material to the trustee and his counsel; liaison between them and the Interhandel management; reporting and interpreting to the Interhandel management on the work of the trustee and on American views, circumstances, conditions and events; receiving interested Swiss visitors to the United States, including representatives of Interhandel; and other tasks of importance on both sides of the Atlantic. This work commanded substantially all of Schmitz's time, thought, effort and attention, involved considerable travel, and required Schmitz to be available at all times. It precluded attention to other business matters. Schmitz's capability to perform this work was unique.

13. It was understood between Schmitz and Interhandel that Schmitz would be compensated by Interhandel for the work described above. No final agreement was reached regarding the amount or rate of compensation. Schmitz's work was solicited by Interhandel and valuable to it.

14. The services that Schmitz performed from June 1, 1960, to December 31, 1961, had a reasonable value of $150,000. In fact, Interhandel paid Schmitz only $38,000, which was accepted by him only as a payment on account, and reimbursed Schmitz only partially for his expenses.

15. There is due and owing from Interhandel to Schmitz the sum of $112,000.

WHEREFORE, Robert A. Schmitz prays that the Court

(1) give him judgment against Interhandel A. G. (a) on the First Claim for Relief, in an amount equal to 5% of such monies as Interhandel shall receive as its share of the proceeds of the sale of the GAF stock, and (b) on the Second Claim for Relief, in the sum of $112,000, plus interest from December 31, 1961; and (c) for the costs of this action;

(2) find that the aggregate of fees, including the aforesaid, does not exceed the section 20 Trading with the Enemy Act limitation or, if the aggregate does exceed the said limitation, find in accordance with the statute the existence of special circumstances of unusual hardship and determine the amount that each fee claimant should receive; and

(3) order the Treasurer of the United States to deduct the sums due to Schmitz from the monies it would pay to Interhandel, and pay them over directly to Robert A. Schmitz; and

(4) grant such other and further relief as to the Court may appear just and proper.

Dated: May 7, 1964

Ginsburg and Leventhal

Attorneys for Robert A. Schmitz
Plaintiff-Intervener
One Farragut Square South
Washington, D.C. 20006

/s/ Robert M. Hausman

[Exhibit to Complaint]

Extract of the Minutes of the Meeting of the Executive Committee of the Board of INTERNATIONALE INDUSTRIE- UND HANDELSBE-TEILIGUNGEN AG, Basle, of

Thursday, April 28, 1960

held in the office of the Union Bank of Switzerland, in Zurich.

1. Whereas: We desire to express recognition of the conviction President Eisenhower expressed that the people of the United States can be of great assistance in promoting international peace by fostering friendship and understanding with the people of other countries, and
2. Whereas: We express recognition and respect of the positive steps in this regard ever since President Eisenhower organized the People-to-People program in September 1956, whereby and under the spirit of which for the first time in history the head of a great nation called on the people as private citizens: "to get together to work out not one method but thousands of methods by which people can gradually learn a little more of each other", and
3. Whereas: We wish to express the assurance of mutual regard for the fact that in all respects, the Swiss, as friendly and free Aliens, share with Americans the ideals of a free way of life and the brotherhood of man, and
4. Whereas: We feel the conviction that in every respect also, the Swiss people, as friendly Aliens, have identical rights to their private property in America, under the Constitution of the United States, as do all Americans themselves, and
5. Whereas: We are contemplating the spirit of that which we understand and trust is a purpose of the Constitution of the United States, and an inalienable right guaranteed by it to its citizens in any event, that every person may appeal to the Chief Executive for Redress of Grievance and Equitable Relief, especially when it can be applied to apparent administrative excesses of the agents, agencies, and past policies of the Government, often the consequence and circumstance of wars, and
6. Whereas: We respectfully submit that neither processes of judges at Law or in Equity, nor activities and actions of the functionaries

of free governments, nor the exercising of the power given any individual in times of national emergency or war may be rightly extended to conflict with the fundamental principles, rights and due process clauses of a free Constitution, such as the Constitution of the United States, and

7. Whereas: We desire to express inspiration and trust in the significant words of President Eisenhower, in his speech on "People and Principles" in Washington, April 17, 1956, when the President said:
   1. "The purpose of the Government is to serve, never to dominate"
   2. "Government must have a heart as well as a head"
   3. "Courage in principle, co-operation in practice, make freedom possible"
   4. "Under God, we espouse the cause of freedom and peace for all people", and
8. Whereas: We express utmost understanding of the fact that the United States of America and its Government is historically true to the principle of the inviolability of private property, through adherance to a policy of sequestration temporary in nature during times of war and not to a policy of confiscation, and
9. Whereas: We believe that the United States Government has found recognizably difficult circumstances in its way towards making effective its correct and honorable FOREIGN POLICY and intentions as to a determination to return to private ownership heretofore vested Alien Property, evidenced by the White House Declaration of 1957 in this regard, and
10. Whereas: We desire to point out the fact that Interhandel AG had its property vested by the United States Government, represented by shares of stock in and to General Aniline and Film Corporation, not as ENEMY property but merely as FOREIGN property, during the crises of World War II, and
11. Whereas: As a corollary to the foregoing, we express every hope and confidence that reason, a sense of truth and justice, and high policy of the good Administration of the United States Government shall note and grasp the crucial difference between the vesting of

actual Enemy property in time of war, and the case-in-point vesting of Swiss private property during World War II, by Presidential Executive Order, under WAR POWERS permitting at the discretion of the President the vesting of "any property or interest of any foreign country or national thereof", as provided by passage of the FIRST WAR POWERS ACT OF 1941, amendment of Section 5(b) of the TRADING WITH THE ENEMY ACT, and

12. Whereas: We wish to respectfully point out that every real sense of truth and justice will meaningfully convey to every man of good will that such exercising of discretionary executive power in wartime did not either actually or rightly transform a foreign national which had always been friendly and had never damaged the United States, into an Enemy of the United States, and violates the rights of Neutrality under International Law, and
13. Whereas: We submit our hope and trust that the United States Government, which has done more good in recent years than any nation in history to protect and promote the causes of free men and societies everywhere, surely in no way directly or consciously espouses the continued deprival of friendly people of their private property, and that other than for difficult circumstances, high policy must surely wish to embrace the spirit of justice in this matter of the vesting of Swiss private property, and grasp the significant disparity between that which was sequestered as actually Enemy, and that which was sequestered as Foreign, merely, and
14. Whereas: We trust, in view of the foregoing, that the evident sense of Justice of the United States of America, and its high policy to adhere to the rule of Law and not of men, and in view of every reasonable and generous decency seen by us in its general conduct of Foreign Policy, will cause the United States Government to reflect and show every consideration of the great difficulties, hardships and injustices which an action the United States deemed necessary in time of war, has visited upon friendly private people including some American citizens also as a source of strife and burden, and
15. Whereas: We truly believe that confiscation is anathema to the United States of America and the principles for which it stands,

and respectfully point out that sequestration even, as well as any appropriation of private property without prompt compensation, is confiscation, and that our property-of-record has been sequestered for some eighteen years, and

16. Whereas: We wish to convey our great respect for the earnest endeavours of the Executive and Legislative branches of the United States Government, whose leaders have been working to resolve the complexities of the vested Alien Property questions, viewed as a whole habitually and generally as former Enemy private property, and
17. Whereas: We understand their problems and appreciate their concern for the principle of the inviolability of private property as well as for the consistency of the objectives of the International Economic Policy of the United States, and for the freedom of private property to be administered and disposed of privately by its owners of title, and
18. Whereas: We wish to take note of the action of the House of Delegates of the American Bar Association, affirming faith in the World Court of Justice, and its referral of its stand on this question to the Committee on World Peace Through World Law, and its favouring of repeal of the Connally amendment, and
19. Whereas: We wish to convey our respect for the efforts of the Administration of the United States Government towards making the World Court most effective as part of their campaign to in every way possible substitute the force of law for the force of arms in world affairs, and
20. Whereas: We desire to point out that we have stood ready and shall always stand ready, as Swiss Nationals carrying out our duties to our Stockholders within a framework of international harmony and law, to in any final eventuality, stand by the findings of the World Court, acting within the framework of its charter which defines its authority, and under which it has ruled in the case of Switzerland versus the United States of America that this case in substance involves the question of Neutrality, and hence comes under its jurisdiction, and
21. Whereas: We submit and truly believe, that, while not only being just and morally right, the return to us of our heretofore vested

property-of-record by the United States Government will do much to help clear the way towards an earliest effective implementation of a number of high policies and programs of the United States Government, and will serve the cause of peace, free private enterprise, and enhance the relations and prestige between the United States of America and all free nations of the world, and

22. Whereas: We have most earnestly considered this matter and the manifold facets of the problems of its solution also as a matter of proper mechanics, in the best interests of the future of the Industry involved, as well as in light of the Prestige and prerogatives of the Sovereign United States Government, and
23. Whereas: We endorse the idea that the object Industry General Aniline and Film Corporation, should, upon being returned to us under our free and independent title of our controlling interest-of-record, become the property and to be controlled by high quality conservative American Industrial and Financial Entities, thereupon and henceforth, in the interest of the United States and for the good of the Industry and its family of employees, and
24. Whereas: Upon having carefully considered this over a period of time, we have concluded that the means whereby such an eventuality should best come to pass will be those under the auspices and direction and advice of outstanding independent American citizens, such as have earned over a lifetime a position and record for accomplishments and dedicated service to the free American way of life and their country's economic and general welfare, and
25. Whereas: In looking to that which ought to be done, we take note and express our great esteem for Mr. Charles E. Wilson of 7, Hampton Road, Scarsdale, New York, appreciative of his exceptionally sound judgment especially in affairs of Finance and Industry, our feeling for his experience and concern for this problem and grasp of its moral significance, and above all, his outstanding record of dedication and service as an American Citizen and Gentleman devoted to this country and the spirit of truth, harmony, and co-operation between peoples, and his selfless patriotic service over many years to his country, and

26. Whereas: We desire to be of good will, to be constructive, and to extend ourselves with every good grace, while nonetheless standing for the prestige and the best interests of our Stockholders and of our own Country, Switzerland, and
27. Whereas: In view of the foregoing, and in the light of all implied covenants of good faith and fair dealing governing the affairs of men everywhere, now,
28. Therefore: We, the Executive Board of Directors of Interhandel AG, at a special meeting, held at Zurich, Switzerland, on April 28, 1960, upon motion made, duly seconded, and carried, do hereby state that it is
29. Resolved: To submit to Mr. Charles E. Wilson, of 7, Hampton Road, Scarsdale, New York, subject to his personal consideration and acceptance, our offer to entrust to him the exclusive and non-revocable authorization and power to act as Trustee, and so to use his good offices and to henceforth do all things and dealings necessary in liaison with the Government of the United States through its highest Executive and Legislative officials, as shall best insure a settlement and disposition of our heretofore vested property-of-record, including the reciprocal exchange of necessary releases, whereby and whereunder clear title shall pass to us and thereupon to American private ownership, under the most effective and sound methods indicated possible, which, while assuring the satisfaction of all equities and the best interests of the Industry, shall see to it that the maximum possible countervalue be obtained, most prudently and within reason, to satisfy the rightful interests of our Stockholders, and, it is further
30. Resolved: That the Vice-Chairman of our Executive Committee, Dr. Alfred Schaefer, be hereby directed to convey to Mr. Charles E. Wilson the Option and conditionally delivered Power of Agency, made part hereof, and to which we have this day affixed our signatures, together with this verified copy of these Minutes and Resolutions, and to confer at the earliest possible date with Mr. Charles E. Wilson.

Mr. Charles E. Wilson
437 Fifth Avenue
New York

Dear Mr. Wilson:

Upon resolution of the Executive Board of Interhandel, a copy of which is attached and made part hereof, we hereby respectfully tender to you this following Option to assume on our behalf a mandate to act as our exclusive agent and trustee, subject to the provisions of the likewise appended Power of Agency, likewise made part of the whole.

Option

To all persons who may come to see these presents, Witnesseth:

This agreement made April 28, 1960, between Internationale Industrie- und Handelsbeteiligungen AG, Peter Merianstrasse 19, Basle, Switzerland, also known as Societe Internationale pour Participations Industrielles et Commerciales S.A., also known as Interhandel AG, a Corporation duly organized and existing under the laws of the Confederation of Switzerland and having its principal office for the transaction of business in Basle, Switzerland, herein called "Interhandel", represented by its Chairman Dr. Charles de Loës, and its Vice-Chairman Dr. Alfred Schaefer, and Mr. Charles E. Wilson, herein called "the Trustee", the parties signatory hereto hereby agree as follows:

Interhandel represents, warrants and agrees:

That Interhandel is the lawful holder and owner of record of 455,448 shares of the Common A stock and 2,050,000 shares of the Common B stock of GAF, and has full and lawful right to enter into this agreement upon the terms and conditions thereof, and that such shares constitute the only shares of GAF owned by Interhandel, directly or indirectly.

1. That the shares of GAF aforesaid were allegedly seized by and vested in the Hon. Henry Morgenthau, Jr. as Secretary of the Treasury of the United States, by virtue of a vesting order, dated February 16, 1942, and allegedly vested in and by the Hon. Leo T. Crowley, as Alien Property Custodian of the United States, and in his successors in office, by virtue of a vesting order, dated April 24, 1942, and are now held by and allegedly vested in the Hon. William Rogers, as Attorney General of the United States, and as successor to and as the Alien Property Custodian; and as a consequence of the vesting aforesaid, all dividends or other distribu-

tions, in cash; stock, property or otherwise, paid or made by GAF on and for in respect of the shares of stock aforesaid are held by and allegedly vested in the Alien Property Custodian and his successors in office or in interest.

2. Subject to all the terms and conditions hereafter, Interhandel hereby grants to the Trustee an option to act as its Agent. The option shall be exclusive, and shall be good and irrevocable, and may be exercised as a whole at any time up to the 28th of July, 1960.

3. The option shall be deemed to have been exercised, and the power of agency it conveys, appended and made part hereof, marked exhibit A, shall become effective, upon signing by the Trustee of the Option, and delivery thereupon of duplicate copies thereof to Interhandel, or to any member of its Executive Board, or to any agent duly authorized by Interhandel to receive delivery of these instruments on behalf of Interhandel.

INTERNATIONALE INDUSTRIE-
UND HANDELSBETEILIGUNGEN
AG:

_____ _____

(Accepted: Charles E. Wilson)

Date:_____ _____

Witnessed:_____ Date: April 28, 1960

_____

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That Internationale Industrie- und Handelsbeteiligungen AG., also known as Societe Internationale pour Participations Industrielles et Commerciales S.A., also known as Interhandel AG, a Corporation duly organized and existing under the laws of the Confederation of Switzerland, and having its principal office for the transaction of business in Basle, Switzerland, Peter Merianstrasse 19, herein called "Interhandel", has nominated, constituted and appointed, and by these presents does nominate, constitute, and appoint, Charles E. Wilson, a citizen of the United States of America, residing in the town of Scarsdale, Westchester County, in the United States of America, its true and lawful Agent and Attorney in Fact, for it, in its behalf, and in its

name, place and stead, to do and perform all and singular the following acts and things:

1. To consummate and conclude with the officers or representatives of the Government of the United States of America, or of any department or agency thereof, any and/or all negotiations related to or connected with any and/or all the property, assets, rights, affairs, and business of the Interhandel, including more particularly but without limiting the generality of the foregoing, the 455,448 shares of the common A stock and 2,050,000 shares of the common B stock of General Aniline and Film Corporation, a Delaware Corporation, allegedly seized by and vested in the Hon. Henry Morgenthau Jr., as Secretary of the Treasury of the United States, by virtue of a Vesting Order, dated February 16, 1942, and allegedly vested in and by The Hon. Leo T. Crowly, as Alien Property Custodian of the United States, and in his successors in office, by virtue of a Vesting Order, dated April 24, 1942, and now held and allegedly vested in the Hon. William Rogers, as Attorney General of the United States, as successor to and as the Alien Property Custodian, including all dividends or other distributions in cash, stock, property or otherwise, paid or made by General Aniline and Film Corporation on and/or in respect of the shares of stock aforesaid and received by the Hon. Henry Morgenthau Jr. as Secretary as aforesaid and/or by his representatives and/or by his successors in office or in interest, and any avails, if any, of the foregoing: and to make, execute, acknowledge, seal and deliver through his signature any and all agreements whatsoever in relation of the foregoing which, in the sole judgment and discretion of the said attorney in fact, shall or may be necessary or desirable for or on behalf of the Interhandel.
2. To ask, demand, collect and receive the property, shares of stock and all other rights of the Interhandel herein referred to, and in furtherance thereof, to take all such step(s) or action(s), conduct and carry on to a final conclusion such proceedings in the United States of America, which, in the sole judgment and discretion of the said Attorney in Fact, may seem to be desirable or necessary

to take for or on behalf of Interhandel in obtaining the immediate possession for and on behalf of Interhandel of all of the shares of stock and rights aforesaid, all dividends, whether in cash or in stock, and all other avails and distributions paid or made thereon or in respect thereof: and all right, title and interest in each and all of the foregoing shares of stock and/or in the dividends and avails paid or made thereon: and to give effectual receipt(s) and fully complete acquitance(s) therefore, and compromise, adjust and settle any or all such claims, demands, suits, actions and proceedings, and to discontinue and finally terminate the same, all such terms, conditions, and/or arrangements in the sole judgment and discretion of the said Attorney in Fact, may be necessary or desirable.

3. To enter into trust and escrow agreements with an American Banking Institution for the purpose of holding in trust any or all such property and assets, rights and business of Interhandel as aforesaid, and to undertake the sale thereunder of any or all such property, assets, rights and business as aforesaid to American Industrial, Financial and other Legal Personalities and private interests and/or any of them as shall be acceptable to the United States Government under the provisions of its Anti-Trust Laws, and which in the sole judgement and discretion of said Attorney in Fact may be necessary and advisable.
4. To hire and employ such representatives and/or Attorneys at Law, and to make, execute and deliver any and all contracts with such Attorneys at Law, Agents, Servants, Representatives, and/or any of them, which in the sole judgment and discretion of said Attorney in Fact, may be necessary and advisable in the execution and furtherance of the powers hereby conferred upon the said Attorney in Fact or intended so to be.
5. To do and perform any and all acts and things necessary or incidental to the foregoing powers, of any of them, or necessary or desirable in connection with the execution of the said powers, or any of the same, and Interhandel hereby ratifies and confirms all and every of the acts and things the said Charles E. Wilson, its said Attorney in Fact, shall do or cause to be done, in or about

or concerning the premises, or any part therefor, and all such instruments of whatsoever nature, signed, executed, sealed and delivered by its said Attorney in Fact, are hereby ratified and confirmed by Interhandel.

6. Interhandel hereby irrevocably vests its said Attorney in Fact with all the powers aforesaid, and renounces all right to revoke any of said Powers of Attorney or to appoint any other person to execute the same, or personally to perform any of the acts which its said Attorney in Fact is hereby authorized to perform, and it shall remain in full force and effect until such time as said Attorney in Fact shall have executed all the powers aforesaid required to be exercised by him to consummate and conclude all negotiations and affairs related to or connected with the disposition of all the property, assets, rights, affairs and business of Interhandel as aforesaid, which shall provide Interhandel with a clear and valid title to all the aforesaid property, assets, rights, affairs or clear and valid title to any and all countervalue received in lieu thereof by Interhandel, whether in cash, bonds, securities, obligations or other forms of assets which shall equitably compensate Interhandel in whole or in part in lieu of the aforesaid allegedly vested property, assets, rights, and affairs of Interhandel.

7. Nothing in this Power of Attorney contained, nor in the execution thereof, shall constitute, or be deemed or construed to constitute, a transfer or assignment by Interhandel to its said Attorney in Fact, of any of its property, assets, shares of stock, or dividends or avails made or paid thereon, or of any interest therein.

In Witness Whereof, the said Internationale Industrie- und Handelsbeteiligungen AG, also known as Societe Internationale pour Participations Industrielles et Commerciales S.A., also known as Interhandel AG, has caused these presents to be signed by its Executive Board, duly authorized by proper and appropriate corporate action, this day of April 28th, 1960.

INTERNATIONALE INDUSTRIE-
UND HANDELSBETEILIGUNGEN
AG:

/s/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE,
Plaintiff
v.
ROBERT F. KENNEDY, et al
Defendants

Civil Action No. 4360-48

[Filed, June 30, 1964]

ORDER ON MOTION OF ROBERT A. SCHMITZ FOR JOINDER OR INTERVENTION AS A PLAINTIFF

Upon consideration of the "Motion of Robert A. Schmitz for joinder or intervention as a plaintiff", and after hearing argument of counsel and consideration of Points and Authorities submitted herein and pursuant to Opinion of the Court this day filed herein, it is by the Court, this 30th day of June, 1964,

ORDERED, that said motion be and the same is hereby denied.

/s/ David A. Pine,
Judge

[Filed, June 30, 1964]

OPINION

Oliver Gasch, Esq., for Eric G. Kaufman

Samuel Becker, Esq., for Counsel of Record for the Kaufman Intervenors

Robert M. Hausman, Esq., for Robert A. Schmitz

John J. Wilson, Esq., for Plaintiff

Lawrence A. Klinger, Esq., for Defendants

From time to time over the past sixteen years this action has occupied the attention of this Court and its Special Master, the United

States Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States. In April of this year it was finally brought to a close. This was accomplished by the entry into a Stipulation of Settlement between plaintiff and defendants, consented to by all the intervenors except a minuscule number, whose rights have been adequately safeguarded, and the filing of praecipes of dismissal with prejudice by the consenting intervenors. The records of this Court have been filled with many volumes of pleadings, thousands of pages of transcript, countless briefs and numerous opinions of the Courts involved. The history of this case gives color to the utterance of a cynical wag that the legal complexities increase in proportion to the amount of money involved; and here the money involved amounts to many millions of dollars.

However, for the purpose of the motions now before me, the issues can be stated in a few sentences, as follows:

The Alien Property Custodian, acting under the Trading With The Enemy Act,[1] vested in himself the American assets of a Swiss corporation known as Societe Internationale Pour Participations Industrielles et Commerciales, S.A., et al. Throughout the litigation this corporation has been frequently referred to as Interhandel, and is referred to as Interhandel herein. These assets consisted of more than 90% of the capital stock of General Aniline and Film Corporation of Delaware and certain bank accounts. Interhandel brought action in this Court to recover these assets claiming they were illegally seized, and the Attorney General, succeeding to the powers of the Alien Property Custodian, answered claiming that Interhandel was controlled by officers and stockholders who were engaged in a conspiracy with the German Government and German nationals to conduct the business of General Aniline and Film Corporation in their interest during the war with Germany, and that, therefore, the vesting was authorized by law.

Intervenors are stockholders of Interhandel who admitted the claim of defendants and the right of the Custodian to retain an interest in these assets proportional to the stock ownership of enemy stockholders. They contended, however, that they and other non-enemy

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1 50 U.S.C. App. 5(b)

stockholders had claims on these assets which it was Interhandel's duty to protect, and that the dominant enemy group in the corporation would not press the corporate claim in a manner that would adequately protect the claims of innocent stockholders.

The basic issue raised by the petition for intervention was what part of the assets of a corporation organized under the laws of a neutral country may the custodian retain where part of the corporate stock is owned by enemies, part by American citizens, and part by non-enemy aliens. The Supreme Court held that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected.[2]

The foregoing is only a brief statement of the issues involved in this litigation, but is sufficient for consideration of the motions now before me, which I shall take up separately, as follows:

The first is a motion by Eric G. Kaufman. He has consented to the stipulation above referred to, and has filed a praecipe of dismissal with prejudice. He has never appeared as counsel in this case, but as an intervenor only.

In his present motion filed after the dismissal with prejudice of his original petition to intervene, as above stated, he moves "for leave to intervene as counsel pro hac vice for Kaufman intervenors in order to assert the circumstances under which Irving Moskowitz, Esq., was retained as counsel to represent Kaufman intervenors." To his present motion he attaches a "motion for interlocutory relief" in which he states that he was one of the original intervenors in this action, and prior to his intervention had performed extensive and exhaustive research as to the manner in which the rights of non-enemy stockholders might be protected; that following this research he entered into a contract with Irving Moskowitz, Esq., by the terms of which Mr. Moskowitz agreed that he should receive "25% of our total gross fees;" that he understands that the amount agreed upon between Interhandel and counsel for the Kaufman group (including Mr. Moskowitz) is "$800,000 for fees alone;" and that although he has a 25% interest in the fees agreed upon between Mr. Moskowitz and his associates "as

[2] Kaufman v. Societe Internationale, etc., 343 U. S. 156.

counsel for the Kaufman group" he has not been able to persuade Mr. Moskowitz to abide by the terms of his agreement. He prays that the Court require the distribution of fees "allotted for counsel for Kaufman intervenors" in accordance with the agreement referred to, and that it issue a rule directing Mr. Moskowitz and his associate counsel to show cause why the agreement should not be honored and enforced. In an affidavit attached to his moving papers he states he is admitted to practice as an attorney in the courts of New York State and is a member of the Bar of the Supreme Court of the United States; that he is the owner of 6 shares of Interhandel and the members of his immediate family own 80 shares in addition thereto; that he commenced extensive legal research with a view toward protecting the stock owned by him, his family, and those similarly situated, namely non-enemy shareholders, and that in 1950 he retained the firm of Graubard and Moskowitz to represent his family and him insofar as their shares are concerned, as well as those similarly situated. With his moving papers he attaches copies of correspondence between Graubard and Moskowitz and himself supporting his claim to receive 25% of the total gross fees. He also attaches copies of correspondence between Graubard and Moskowitz and Robert Sher and Isadore Alk. The latter two were retained as Washington counsel by the former, who were not members of the bar of the District of Columbia. Messrs. Sher and Alk succeeded Messrs. Kominers and Fisher, who had previously been retained by Graubard and Moskowitz as Washington counsel.

The question is whether he may now intervene in this action to assert his claim to 25% of the fee agreed to be paid to his own counsel under a private out-of-court agreement between Interhandel and his counsel, or whether he should be remitted to a separate action against his counsel to enforce his contractual claim.

In the first place, there is no proceeding pending in this Court in which he may intervene, since the petition for intervention to which he was a party has, as above stated, been dismissed with prejudice. Therefore, Barnes v. Alexander, 232 U.S. 117, and the other cases cited by petitioner are not apposite. In those cases there were proceedings pending in court. He disavows any claim against Interhandel (T. pp. 82, 84).

In the second place, any moneys to be paid in the future to Mr. Moskowitz and his associates by Interhandel are not a fund before the Court. By his own statement they constitute moneys that will be paid by Interhandel as a result of a private agreement reached between Interhandel and Mr. Moskowitz and his associates.

As stated by the Special Master in this case, in an opinion confirmed by this Court on July 23, 1952, it cannot 'be said that in any real sense property in the possession of the Alien Property Custodian [as here] is 'in the custody or subject to the control or disposition of the Court.'"

In its Memorandum Opinion of October 17, 1963, this was made clear by this Court when it stated that the responsibility for an amicable settlement of the case, if that was desired by the parties, resides in the parties themselves and their counsel who are all sui juris, and who possess an intimate familiarity with the issues of law and fact involved in the litigation growing out of their years of association with its details and ramifications. Such a settlement necessarily would include a settlement of counsel fees.

In the third place, Kaufman can not intervene of right under Rule 24(a), Fed. R. Civ. P., because he does not come within any of the categories giving such right, and cannot intervene under Rule 24(b), Fed. R. Civ. P., relating to permissive intervention for the same reason.

In the fourth place and finally, intervention must be denied him for the reason that §9(f) of the Trading with The Enemy Act, supra, provides that "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." The claim of movant does not come within any exception provided in the Act; and the legislative obstacle specifically contained in §9(f), supra, was clearly recognized and enforced in Berger v. Ruoff, 90 U.S. App. D.C. 276, and in Von Opel v. Uebersee Finanz Korporation, 96 U.S. App. D.C. 230, hereinafter discussed.

For the foregoing reasons the motion of Eric G. Kaufman for leave to intervene must be denied.

II

The second motion is by Robert A. Schmitz, who appears from the papers to be a resident of Connecticut. He moves "for an Order joining him as a party plaintiff or, in the alternative, pursuant to Rule 24(a) and (b) for leave to intervene as a plaintiff, in order to assert the claims set forth in his proposed complaint."

Briefly stated, he asserts that Dr. Alfred Schaefer, acting for Interhandel, in October 1959 agreed to pay him 5% of any moneys which Interhandel should receive in settlement of its dispute with the United States "for bringing about Mr. Wilson's (Charles E. Wilson's) trusteeship" of Interhandel, and also in quantum meruit for services performed by him for Interhandel which he estimates have a reasonable value of $150,000.

He asserts that Mr. Charles E. Wilson was to receive no compensation for his services and the only compensation which Interhandel undertook to pay was compensation to him, movant Schmitz; that Mr. Wilson sought to carry out his functions as trustee after accepting his trust powers on May 23, 1960, but in 1961 Interhandel directed the trustee to suspend negotiations with the United States Government, and in November 1962 Mr. Wilson resigned his trusteeship, and that the activities of the trustee, Mr. Wilson, contributed to the disposition of the Government to enter into a settlement with Interhandel. Interhandel disputes these claims in their entirety, and contends that movant stands before the Court as a plaintiff seeking an in personam judgment against a foreign corporation without service of process.

This movant has come into this case for the first time by the filing of the above described motion after the plaintiff and defendants have entered into a Stipulation of Settlement, and the sole question before the Court is whether he may now litigate in this action his claims against Interhandel.

At the outset, it might well be questioned whether his activities, as above set forth, which would seem to be that of a "finder" as it is colloquially described, come within the purview of compensable services recognized by the Trading With The Enemy Act, but it is not necessary to reach a conclusion on that point, for the following reasons:

Sec. 9(a) of the Trading With The Enemy Act, provides that "any person not an enemy, or ally of an enemy, claiming interest in vested property may file a claim or bring a suit for the return of the property. This is the exclusive remedy provided by the Statute to make a claim for an interest in vested property (Kennedy v. Union & New Haven Trust Company, 296 F.2d 655), and this action was brought under Sec. 9(a). Movant had no interest in the property now held by the Attorney General at the time of vesting, and could not have obtained any interest therein from plaintiff thereafter, because upon vesting the Attorney General "succeeds to all rights in the property." Commercial Trust Company v. Miller, 262 U.S. 51, 56; Cummings v. Deutsche Bank, 300 U.S. 15. He, therefore, can not be a party plaintiff in this action, and the Court lacks jurisdiction to entertain his claim.

Moreover, his claim to intervention, if based upon a lien on the vested property, (and the cases relied on by movant in large part are based upon a lien) is specifically barred by §9(f) of the Trading With The Enemy Act, which provides that the property vested "shall not be liable to lien, attachment, * * * or subject to any order or decree of any court." In construing this Section the Court of Appeals for this jurisdiction in Von Opel v. Uebersee Finanz Korporation, supra, held in a case involving a claim by a statutory receiver to recover an interest in vested property that Congress had made no provision for the disposition of a suit of that kind in the Trading With The Enemy Act, that she could not intervene, and that litigation under the Act is limited to that which the Act permits. This case is likewise authority for the conclusion reached in the next preceding paragraph. Also, in Berger v. Ruoff, supra, an action brought by an attorney to intervene to enforce a lien for his fee for services rendered to a claimant under this Act, a much stronger case than movant's where the plaintiff came clearly within the purview of the class entitled to fees, the Court held that the language of this Section forbade the impressing of any lien on the property.

The Stipulation of Settlement provides that after certain actions shall have been taken, plaintiff and defendants will present to the Court a consent judgment, or if such judgment is not entered, plaintiff and defendants will file dismissals of the complaint and counterclaims,

respectively, with prejudice. No judgment has been presented. Previously this Court has questioned its necessity and propriety, has indicated its predisposition not to enter one, and has suggested to counsel that all that is necessary for the termination of this action of record is the filing of praecipes of dismissal as provided in the Stipulation of Settlement. Indeed, the Stipulation of Settlement was amended to include this alternative method of termination at the Court's suggestion. Therefore, the entry of a judgment in the future cannot be assumed as a premise.

The Stipulation of Settlement provided that certain actions were to be taken by the parties. Among them was a provision that Interhandel will submit satisfactory evidence as required by §20 of the Trading With The Enemy Act, that the aggregate of all fees does not exceed the limitation imposed by this Act. Whether there is any necessity for such provision in the Stipulation has likewise been questioned by the Court, inasmuch as the settlement which has been entered into is an out-of-court, inter-party disposition of the case without approval or disapproval by the Court. Sec. 20, supra, provides that "no property or interest or proceeds shall be returned under this Act * * * nor shall any payment be made or judgment awarded, * * * unless satisfactory evidence is furnished to the President or such officer or agency as he may designate, or the Court, as the case may be, that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 percentum of the value of such property or interest or proceeds or of such payment."

Absent a judgment, as to which, as above stated, this Court questions the necessity and propriety, it would appear that the satisfactory evidence referred to should be furnished to the President or such officer or agency as he may designate and not to the Court. If a judgment should be entered, then, and only then, before its entry, the Court under this §20 must have satisfactory evidence that the fees do not exceed the maximum amount.

There would appear to be no reason or basis for the submission of such evidence unless the Court is called upon to take some action in connection with the case, or unless the parties wish to file such

evidence for record purposes. There is no provision other than the one above referred to relating to fees, except in the case of a claim for an amount in excess of the maximum. Then, upon petition, the Court in the District where claimant resides is authorized to allow an amount in excess of the maximum upon a finding of special circumstances of unusual hardship. No such claim is before the Court, and movant does not satisfy the residential requirements. Sec. 20 is not a provision for the judicial determination of fees, as movant seems to assume, but is a statute to protect the owner of seized property from unreasonable or extortionate charges in seeking its recovery. (Kroll v. McGrath, 91 U.S. App. D.C. 172.) It, therefore, provides no basis for intervention.

Movant also claims that he should be allowed to intervene either as of right or permissively, under Rule 24(a) and (b), Fed. R. Civ. P. For the reasons above set forth he cannot intervene as a plaintiff in this action, and it would serve no useful purpose to point out the many other obstacles in his path to such intervention, as they are patently apparent in the language of the rule itself and in the authorities construing it. Neither is there any merit to his contention that he should be joined as an indispensable party pursuant to §19(a), Fed. R. Civ. P.

For all these reasons the motion of Robert A. Schmitz must be denied.

/s/ David A. Pine, Judge

Date: June 30, 1964

[Filed, August 28, 1964]

NOTICE OF APPEAL

Notice is hereby given that Robert A. Schmitz, the applicant for joinder or intervention above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the order denying his motion for joinder or intervention as a plaintiff, entered on June 30, 1964.

/s/ Robert M. Hausman
Attorney for Robert A. Schmitz,
Appellant

BRIEF FOR APPELLEES
NICHOLAS deB. KATZENBACH, ACTING ATTORNEY GENERAL
AND THE TREASURER OF THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 18,939

ROBERT A. SCHMITZ,

APPELLANT

v.

NICHOLAS deB. KATZENBACH, ACTING ATTORNEY GENERAL, as Successor to the Alien Property Custodian, and the TREASURER OF THE UNITED STATES

and

SOCIETE INTERNATIONALE, etc.,

APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL EARDLEY,
Acting Assistant
Attorney General,

SHERMAN L. COHN,
LAWRENCE A. KLINGER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

QUESTION PRESENTED

In the opinion of this appellee the question presented is:

Whether one who claims a wholly disputed fee from a non-resident foreign corporation may intervene, on the basis of section 20 of the Trading with the Enemy Act, as party plaintiff in the corporation's statutory proceeding, brought under section 9(a) of the Trading with the Enemy Act against the Government, in order to litigate his claimed fee in that action and thereby obtain an *in personam* judgment against plaintiff corporation without service of process upon it, and if successful therein to sequester funds in the hands of the Government.

INDEX

CITATIONS

Cases:

* Cases chiefly relied upon are marked by asterisk.

*Cases chiefly relied upon are marked by asterisk.

COUNTERSTATEMENT OF THE CASE

The basic suit involved here was instituted under section 9(a) of the Trading with the Enemy Act, 40 Stat. 419, amended, 41 Stat. 35, 42 Stat. 1065, 50 U.S.C.App. 9(a), to recover some 93% of the stock of General Aniline & Film Corporation and approximately $1,780,060 in cash. The property was vested pursuant to section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 55 Stat. 839, 50 U.S.C.App. 5(b), and the Executive Orders promulgated thereunder, reciting that it was property owned by or held for I. G. Farbenindustrie, A.G., a German "National." Plaintiff, Societe Internationale pour Participations Industrielles et Commercials, S.A. (hereinafter Interhandel), a Swiss corporation, filed administrative claims, followed by this action instituted in the court below in October 1948. The defendants are the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States.

After 16 years of intense and complex litigation, the differences between Interhandel and the United States were resolved. A Stipulation of Settlement was filed in the District Court on December 20, 1963, and amended March 25, 1964, J.A. 1.[1/] The document sets forth the formula by which all claims will be resolved, and by which the proceeds from the anticipated sale of the stock of General Aniline & Film Corporation will be divided.

1/ The reference "J.A." followed by a number is a reference to the page number of the Joint Appendix filed in this court.

On May 7, 1964, Robert A. Schmitz (the appellant here) moved, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, for an order joining him as a party plaintiff, or in the alternative for leave to intervene as party plaintiff pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, J.A. 6. Mr. Schmitz claims, pursuant to an alleged oral contract with Interhandel, 5% of any return realized by Interhandel, and a sum in quantum meruit for services performed. In his petition Mr. Schmitz requests the court to order the Treasurer of the United States to deduct the sums due to him from the monies it would pay to Interhandel, and to pay them over directly to Robert A. Schmitz, J.A. 7.

Interhandel disputes Mr. Schmitz' claim in its entirety (TR. 53).[2/] In the court below the corporation further contended that as a foreign corporation it could not be subjected to an in personam judgment without proper service, and that there was no basis for intervention or joinder.

The Attorney General contends that the Trading with the Enemy Act does not create or recognize any rights or interests upon which the applicant could predicate his motion for joinder or intervention.

On June 30, 1964, the District Court ruled that, as section 20 of the Trading with the Enemy Act, 70 Stat. 331, 50 U.S.C.App. 20, did not provide for a judicial determination of fees, it could not be used as a basis for intervention. The court further specifically denied Mr. Schmitz'

2/ The reference "TR." followed by a number is a reference to the page number of the transcript of the hearing before Judge Pine on June 24, 1964.

application for intervention (under Rule 24(a) and (b), Federal Rules of Civil Procedure) and joinder (pursuant to Rule 19(a) of the Federal Rules of Civil Procedure (J.A. 32, 231 F. Supp. 132 (D. D.C., 1964)).

This appeal is taken from that denial of Mr. Schmitz' motion.

STATUTES AND RULES INVOLVED

The pertinent provisions of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.App. 1 et seq., are as follows:

> Section 7(c). The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [said sections], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

> Section 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required

and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 and 41-44 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: Provided further, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If

the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

Section 9(f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

Section 20. No property or interest or proceeds shall be returned under this Act [sections 1-6, 7-39 and 41-44 of this Appendix], nor shall any payment be made or judgment awarded in respect of any property or interest vested in or transferred to any officer or agency of the United States under this Act [said sections] unless satisfactory evidence is furnished to the President or such officer or agency as he may designate, or the court, as the case may be, that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment. Any agent, attorney at law or in fact, or representative, believing that the aggregate of the fees should be in excess of such 10 per centum may, in the case of any return of, or the making of any payment in respect of, such property or interest or proceeds by the President or such officer or agency as he may designate, petition the district court of the United States for the district in which he resides for an order authorizing fees in excess of 10 per centum and shall name such officer or agency as respondent. The court hearing such petition, or a court awarding any

judgment in respect of any such property or interest or proceeds, as the case may be, shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of fee, accepted prior to approval hereunder, in excess of the fee as approved, shall be guilty of a violation of this Act [said sections]. As amended June 25, 1956, c. 436, 70 Stat. 331.

Federal Rules of Civil Procedure:

Rule 24(a). Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b). Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

SUMMARY OF ARGUMENT

In order to intervene in a section 9(a) suit appellant must meet the jurisdictional requirements set forth in the Act. Appellant does not have any interest in the vested property, as is required by section 9(a), nor may he claim an interest in the nature of a lien since liens are specifically barred by section 9(f) of the Act.

Section 20 requires the district court to make a finding of special circumstances of unusual hardship before aggregate agreed-upon fees in

excess of 10 per centum of the recovery may be paid. It does not provide a forum for the adjudication of contested fees. Appellant has failed to meet the requirements for intervention as set forth in Rule 24 of the Federal Rules of Civil Procedure in that he will not be bound by a section 20 determination (24(a)(2)); he will not be adversely affected by the disposition of property in which he has no interest (24(a)(3)); and his claim presents no question of law or fact in common with the main litigation.

ARGUMENT

Introduction

A joint motion to dismiss this appeal because of appellant's failure to comply with the requirements of Rule 54(b), Federal Rules of Civil Procedure--requiring a certificate in order to appeal where a case is not entirely completed in the district court--was filed by the appellees on November 30, 1964. At the time of this writing the disposition of this motion is not known. In the event that consideration of the motion is held over until the presentment of the case on the merits, this appellee adopts and incorporates herein the points presented in the joint motion and memorandum in support thereof.

I. Appellant May Not Intervene as Party Plaintiff in a Suit Against the United States Brought Under Section 9(a) of the Trading With the Enemy Act Because He Does Not Meet Jurisdictional Requirements of the Act.

A. Appellant Does Not Have an Interest in the Vested Property Recognizable Under the Terms of the Trading With the Enemy Act.

Intervention is sought by the appellant for the purpose of litigating a contested fee claim against Interhandel. This intent is manifest by the

dual caption of appellant's proposed complaint wherein Interhandel and the Treasurer of the United States are made parties defendant. That the appellant would be presenting a new, separate and unrelated cause of action is evidenced by the fact that the defendants in the main litigation have no interest in the merits of the controversy between appellant and Interhandel. The Government is opposed to the application for intervention because by seeking affirmative relief appellant is bringing an unconsented to suit against the Government, and is attempting to litigate claims which are not recognizable under the terms of the Trading with the Enemy Act. The very questions presented by this appeal have twice been before this Court and have twice been resolved adverse to persons in the exact position of appellant.

Appellant attempts to intervene as party plaintiff in a section 9(a) proceeding commenced by Interhandel against the Government for the return of vested property. By becoming a party plaintiff, and by requesting affirmative relief against the Government, appellant is in substance bringing a suit against the United States. He is thereby required to meet the terms under which the sovereign has consented to be sued. Soriano v. United States, 352 U.S. 270, 276-77; Munro v. United States, 303 U.S. 36, 41.

Section 9(a) of the Trading with the Enemy Act constitutes the limited consent by the United States to be sued. It provides that "any person not an enemy or ally of enemy claiming an interest, right, or title" in vested property may file a claim or bring suit for the return of such property. (50 U.S.C.App. 9(a))

Appellant does not claim to have an interest in the vested property, the stock and case of General Aniline and Film Corporation which is the subject of this suit. He, therefore, fails to satisfy the basic conditions required by the jurisdictional statute. Intervention will not be permitted where the proposed claim is jurisdictionally unsound. United States v. Great Northern Ry. Co., 32 F. Supp. 651 (D. Mont.), aff'd., 119 F. 2d 821 (C.A. 9); modified in respects not here relevant, 315 U.S. 262.

As the property was vested during the period of 1942-1946, appellant cannot claim a pre-vesting interest based on his actions in 1957. Moreover, the appellant could not have obtained any interest in the property from Interhandel after it was vested, for upon vesting the Attorney General "succeeds to all rights in the property . . . as completely as if by conveyance, transfer or assignment." Commercial Trust Co. v. Miller, 262 U.S. 51, 56; Cummings v. Deutsche Bank, 300 U.S. 115. Any right, title or interest in the subject property which appellant might claim to have acquired from or through Interhandel after vesting must, therefore, be a nullity.

Indeed, Congress expressly addressed itself to this very situation. As a caveat to the permission to file a claim or bring suit which it granted in section 9(a), Congress added in section 9(f) a condition that the property vested by the Alien Property Custodian "shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." 50 U.S.C.App. 9(f).

As we have noted, the very questions raised here, and the effect of section 9(f) upon section 9(a) in this context, have twice been presented

to this Court and have twice been resolved against the claimed right of intervention. In Berger v. Ruoff, 90 U.S. App. D.C. 276, 195 F. 2d 775, certiorari denied, 343 U.S. 950, an attempt was made at intervention by an attorney who sought legal fees. There, like here, the basic suit represented a claim for the return of alien property vested under the Trading with the Enemy Act. There, as here, one who asserted that his service aided the plaintiff in the presentment of his claim sought to intervene in order to acquire his asserted fee from whatever property might be returned to his former client. There, as here, the district court denied intervention. This Court affirmed per curiam, disposing quickly of the asserted right to intervention (195 F. 2d at 776):

> The alleged lien, if any, arose after the property vested. Section 9(f) of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 9(f), provides that, with irrelevant exceptions, "the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." We think the alleged lien invalid for this reason. Cf. La Mettrie v. James, 55 App.D.C. 354, 6 F.2d 479, aff'd, De La Mettrie v. James, 272 U.S. 731, 47 S.Ct. 264, 71 L.Ed. 496. We need not consider whether it is invalid for other reasons.

Three years later this Court was again faced with the question in Von Opel v. Uebersee Finanz Korporation, 96 U.S. App. D.C. 230, 225 F. 2d 530. There the wife of a plaintiff in a section 9(a) suit, as a court-appointed receiver and sequestrator of her husband's property by reason of separate marital litigation, sought to intervene to litigate her claim to the property. In holding that the district court correctly denied her intervention, this Court, speaking through Judge Fahy, pointed out "that appellant does not claim an interest in the vested property itself but

only an interest in Fritz von Opel's claim to the vested property." Therefore, the Court held, "her proposed intervention is not within the authorization of Section 9(a) of the Act, available only to one 'claiming any interest, right, or title in any money or other property' vested by the Custodian." 225 F. 2d at 531. Considering her "interest" to be "in the vested property," the Court held that "then clearly its nature is that of a lien barred from being litigated in a Section 9(a) suit against the Custodian. This is so because [of] Section 9(f) . . ." Thus, the Court concluded (ibid.):

> Whatever legal terminology should properly be used to describe appellant's interest, Congress has made no provision for its judicial disposition in a suit under Section 9(a) or under any other provision of the Trading with the Enemy Act. Clearly it is not within Section 17 "to enforce" the provisions of the Act, or within Section 34 to review determinations by the Attorney General of claims of creditors. And litigation under the Act is limited to that which the Act itself permits. Tiedemann v. Brownell, 96 U.S.App.D.C. ____, 222 F.2d 802.

Since Congress has made no provision for the judicial determination of claims such as appellant's, his petition must be denied. 3/

3/ Appellant's reliance on sections 30 and 32(f) of the Act are misplaced. (App. Brief, p. 19, 20.) Both section 32(f) and its predecessor, section 30 of the Act, refer to property which is being returned administratively, and not to recoveries gained through litigation or the settlement thereof. The Congressional design with regard to vested property which is the subject of a 9(a) action is spelled out by section 9(f) --it shall "not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." It is noted that under sections 30 and 32(f) the claimant must perfect his claim according to the normal remedies available to a creditor in a court of competent jurisdiction. The Act does not provide for the adjudication of such claims by the courts, and in any event appellant has filed no such claim administratively.

B. Section 20 of the Trading With the Enemy Act Does Not Provide for the Adjudication of Contested Fee Claims.

Appellant's motion for intervention is predicated on the notion that section 20 of the Act provides a forum for the judicial adjudication of claims for fees. By providing for judicial review of fees where the aggregate of such fees exceeds 10% of the recovery, Congress was acting to "protect the owner seeking restoration of seized property from unreasonable or even extortionate fees for services." Kroll v. McGrath, 91 U.S. App. D.C. 172, 199 F. 2d 187 (1952).

Section 20 provides that fees in excess of 10% of the recovery may not be paid unless a district court finds "special circumstances of unusual hardship which require the payment of such excess." But this does not mean that the court, which is limited to making such a finding, can avoid all of the jurisdictional prerequisites to an in personam judgment and entertain a claim for contract damages which is really unrelated to the main action it has before it. Appellant is correct when he states that a section 20 proceeding in Connecticut could not result in a judgment against Interhandel or against the funds. App. Brief, p. 19. This is so because the federal district court in Connecticut would lack the same jurisdictional contacts that the court below lacks, and because section 20 is not a grant of jurisdiction to hear and determine contested claims for fees. We agree with appellant that the function of a court is to adjudicate,[4/] but only those matters over which it has jurisdiction. Section 20 does not confer such jurisdiction.

4/ App. Brief, p. 21.

Since Interhandel disputes appellant's claim, it is incumbent upon appellant to show that he was an agent of Interhandel, that he rendered services on its behalf, and that Interhandel is under an obligation to compensate him for such services, before he has standing to commence a section 20 proceeding. The statute speaks of "fees to be paid" and not of fees which are claimed. No case decided under section 20 of the Act has involved the adjudication of a contested fee claim, and the Act simply does not provide for such litigation.5/

Appellant should seek judicial resolution of his contract action against Interhandel before any court having in personam jurisdiction. If he obtains such a judgment, he could then petition the District Court for the District of Connecticut for the limited section 20 finding if the payment of his claim would bring the aggregate of the fees over 10%. The absence of the appellant from any section 20 proceeding, judicial or administrative, would not be a bar to his independent action in the district where he resides. Such a proceeding deals with the relation of the aggregate of fees to be paid with the amount to be returned, not with whether any fee is due and owing.

The holding in Fontheim v. Legerlotz, 102 N.Y.S. 2d 847 (Sup. N.Y., 1951), does not support the position advanced by appellant that if he cannot intervene in this action he will thereafter be foreclosed from presenting

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5/ The case of Aritani v. Kennedy, 228 F. Supp. 706 (D. D.C., 1964), is clearly distinguishable. That case was concerned with the compromise of a class action, involving 2,963 claimants, and, as such, could not be dismissed or compromised without the approval of the court pursuant to Rule 23(c) of the Federal Rules of Civil Procedure. It was agreed, as (footnote continued)

his claim anywhere else. In that case a fee had been approved by the Custodian since, under then existing law, the Alien Property Custodian had to approve the "reasonableness" of all fees under ten per cent. This burden was removed by the amendment to section 20 of 1956 (70 Stat. 331), and now all fees under 10 per cent are allowed without question. But under the law as it existed at the time of the Fontheim decision, the claimant there was requesting the New York Court to award him a larger fee than the Custodian had specifically allowed. Instead of holding, as appellant would have us believe, that the section 20 determination was final and that no further relief could be had, the court concluded: "any additional sum can only be had through application to the Custodian through the channels provided." 102 N.Y.S. 2d at 849. Appellant will not be deprived of any of his rights by not being allowed to intervene in this action, and will not be bound by a determination or judgment to which he is not a party.

The necessity of any judicial section 20 proceeding arises only in the event the aggregate of fees exceeds 10 per cent of the recovery. Until the anticipated sale of the stock of General Aniline and Film Corporation is consummated, the quantum of Interhandel's recovery is mere speculation. It is possible, if not probable, that the aggregate of all fees (including

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5/ (Continued from page 13.) an integral part of the settlement, that the Government would offer no objection to an aggregate of fees not in excess of 20 per cent. Thus, the court had jurisdiction over the fee question; first, because it was part and parcel of the settlement which took section 20 into account since the aggregate exceeded 10%, and second, because of the court's inherent power to review fees when dealing with class actions. No contested fee claims were presented to the court for adjudication.

appellant's disputed claim), will not exceed ten per cent, thereby eliminating, in the absence of a judgment, the necessity of any judicial involvement with section 20.

Furthermore, we should like to note once again that in Berger v. Ruoff, supra, 90 U.S. App. D.C. 276, 195 F. 2d 775, certiorari denied, 343 U.S. 950, this Court was faced with this very situation. There an attorney sought to intervene to protect his alleged legal fee arising out of the alien property claim. Here too the alleged fee--not for legal services--is alleged to arise out of the claim for return of vested alien property. Here too there is no basis for intervention because, as the Court held in Berger, Congress has not provided for such an action.

II. Appellant Fails to Meet the Requirements for Intervention as Set Forth in Rule 24, Federal Rules of Civil Procedure.

Appellant attempts to avoid the restriction of section 9(f) by reference to Rule 24, Federal Rules of Civil Procedure. The short answer to this argument is that it has been tried before without success. This Court made clear in Von Opel, supra, that "Rule 24, . . . relating to intervention, must be given application consistently with the limitations placed by Congress upon litigation under the Trading with the Enemy Act." 225 F. 2d 531.

Although we believe it patent that this is the complete answer to appellant's reliance on Rule 24, an examination of the rule itself shows that, even where suits under the Trading with the Enemy Act not restricted, intervention would not be proper.

A. The Appellant Does Not Qualify Under Rule 24(a)(2) F.R.C.P. Because He Will Not Be Bound by a Section 20 Determination.

Rule 24(a)(2) bestows a right to intervention if "the applicant is or may be bound by a judgment in the action. . . ." The leading case construing the phrase "is or may be bound" is Sutphen Estates v. United States, 342 U.S. 19, rehearing denied, 342 U.S. 407, where the court denied intervention saying that the decree "is not res judicata of the rights sought to be protected through intervention." Citing Sutphen, this Court recently stated in Atlantic Refining Co. v. Standard Oil Co., 113 App. D.C. 20, 304 F. 2d 387, 393 (emphasis supplied):

> It is now well settled that in conventional litigation, the test to be applied in determining whether an applicant for intervention under Rule 24(a)(2) will be bound by a judgment in the action is whether he would be bound by such a judgment under the doctrine of res judicata.

The eventual holding of the Atlantic case in permitting intervention in a suit where the final judgment would not, in a strict sense, be res judicata was carefully qualified and limited by the court. (304 F. 2d at 394):

> We are of the opinion, as this court held in Textile Workers v. Allendale Co., 96 U.S. App. D.C. 401, 226 F. 2d 765, cert. den., 351 U.S. 909, 76 S.Ct. 699, 100 L.Ed. 1444, that in actions brought by a private person to have an order or regulation of an administrative agency adjudicated invalid the res judicata test for determining whether an application for intervention in an action will be bound by the judgment therein is unworkable and inappropriate.

Appellant has made no attempt to bring himself within the restricted class to which the res judicata standard is relaxed. And, indeed, he cannot do so.

Under section 20 only if the fees are in excess of 10 per cent of the recovery is the court required to act, and then its only function is to determine if there are "special circumstances of unusual hardship" to justify payment of the fee. A section 20 determination would only apply to those fees which are to be paid by Interhandel and presented to the

court. Appellant would not be bound under the doctrine of res judicata if he were not a party in those proceedings. Section 20 clearly states that "any agent, attorney at law or in fact, or representative believing that the aggregate of the fees should be in excess of 10 per centum" may petition the district court of the United States for the district in which he resides for an order permitting the payment of said fees. There would be nothing to prevent appellant from reducing his claim to judgment, and then petitioning the district court in Connecticut for approval. 6/

In Fontheim v. Legerlotz, supra, the court told the claimant he must reapply under section 20 if he desired a larger fee than originally approved. If a section 20 determination is not res judicata as to fees approved, it certainly cannot be construed as res judicata as to fees not presented to the court or Custodian.

B. Appellant Does Not Qualify Under Rule 24(a)(3) Since He Will Not Be Adversely Affected by Whatever Disposition of the Vested Property May Occur.

It is well established that an applicant under Rule 24(a)(3) must have an "interest" in the subject matter of the litigation in order to intervene therein. Pure Oil Co. v. Ross, 170 F. 2d 651 (C.A. 7). The court in that case stated (170 F. 2d at 653, emphasis supplied):

> Rule 24(a)(3), Federal Rules of Civil Procedure, 28 U.S.C.A., permits anyone upon timely application to intervene in an action as a matter of right when the applicant is so situated

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6/ The Connecticut District Court would not be impeded by or in conflict with any other tribunal in reviewing a section 20 petition. It would look to the circumstances found by the other court and see if they could be expanded sufficiently to justify the new fees. As there is no limit to the amount of fees that may be paid if special circumstances of special hardship exist, appellant would not be prejudiced by the earlier determination.

> as to be adversely affected by a distribution of property in the custody of a court or of an officer thereof, and the law is well settled, that to authorize an intervention, the intervenor must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment.

The principle announced has been approved by this court.[1/]

Appellant has no interest in the property which is the subject of this litigation. Compare Von Opel v. Uebersee Finanz Korporation, supra, 225 F. 2d 530, 531. He alleges a claim for services rendered in connection with the settlement of the litigation. Since he has no claim to the actual property, he will not be affected by its disposition. Before appellant can collect his alleged fee, he must obtain an in personam judgment against Interhandel, as his claim is an independent contract action against the corporation.

Appellant is not aided by the Second Circuit's decision in International Mortgage Corp. v. Von Clemm, 301 F. 2d 857, for there the court agreed that an interest in the property must be present before intervention will be allowed. Intervention was granted under Rule 24(a)(3) on the basis of the court's findings under Rule 24(a)(2) (301 F. 2d at 862):

> [W]e have already concluded that appellants each have a substantial interest in the property in litigation and that they may be bound by a judgment, a fortiori they are "so situated as to be adversely affected by a distribution or other disposition of this property. . . ."

Several distinctions between the situation in the International Mortgage case and this one exist. The intervenors there were asserting

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1/ Kaufman v. Societe Internationale, 88 U.S. App. D.C. 296, 188 F. 2d 1017, 1018 (C.A.D.C.), rev'd. on other grounds, 343 U.S. 156 (1952); Dowdy v. Hawfield, 88 U.S. App. D.C. 241, 189 F. 2d 637, 638 (C.A.D.C.).

claims as pre-vesting owners to the property. Hence, an adjudication as to ownership and subsequent disposition of the property would adversely have affected them. Intervention was permitted those intervenors as party defendants with the restriction that they could only aid the Government in defeating the plaintiffs' claim, but could not obtain any affirmative relief against the Government. 301 F. 2d at 863.

As we have demonstrated above, appellant would not be bound by a section 20 proceeding nor will he be adversely affected by the disposition of property to which he has no claim.

On page 27 of his brief, appellant claims that a limited fund is to be divided as a byproduct of the litigation in the main case below, and that, if he is not a party there, he will be precluded from obtaining his share. This is not a realistic reflection of what the case below, or appellant's case, involves. There is no limit as to the amount of the recovery which may be consumed by fees if the necessary "special circumstances of unusual hardship" are found to be present. In appropriate circumstances fees have exceeded ten per cent. Aritani v. Kennedy, supra (20%); Rosden v. Kennedy, 308 F. 2d 451 (C.A. 2) (over 30%). Thus, there is no limited fund from which fees are to be paid.[8/]

Appellant is attempting to obtain in personam jurisdiction over Interhandel by intervening and thus avoiding the standard bond necessitated

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8/ If judgment is obtained against Interhandel, execution upon the judgment is of course not limited to the property returned by the Custodian. Execution may be had against any of Interhandel's assets.

by an in rem action, the difficulties of obtaining service over a foreign non-resident corporation, and the inconvenience of bringing litigation in a foreign court. The words "adversely affected" in Rule 24(b) mean more than the denial of the most convenient forum from a financial and practical point of view.

C. The District Court's Denial of Appellant's Application for Permissive Intervention Under Rule 24(b), F.R.C.P., Was Not an Abuse of Discretion as No Common Question of Law or Fact Was Presented.

The District Court in the opinion below specifically stated (J.A. 24, 231 F. Supp. at 137):

> Movant also claims that he should be allowed to intervene either as of right or permissively, under Rule 24(a) and (b), Fed.R.Civ.P. For the reasons above set forth he cannot intervene as a plaintiff in this action, and it would serve no useful purpose to point out the many other obstacles in his path to such intervention, as they are patently apparent in the language of the rule itself and in the authorities construing it.

Appellant has confused the court's denial of permissive intervention under Rule 24(b) for "reasons patently apparent" with a failure to consider the rule at all.

It is evident that the statutory provision that a common question of law or fact be shared by the intervenor and the original litigants is a minimum prerequisite before the applicant can appeal to the discretion of the court. Appellant cannot meet this threshold requirement. The appellant desires to litigate a contract action between itself and Interhandel within a suit to determine whether Interhandel is entitled to the return of its property under the terms of the Trading with the Enemy Act. Indeed, appellant predicates the Rule 24(b) claim on the section 20 determination

alone. As we have indicated, a section 20 determination looks solely at the circumstances surrounding fees to be paid, and not at the validity or legal basis for the payment of such fees. The provision for judicial scrutiny of fees over 10%, in order to protect those who are in no position to insist upon lesser fees, does not confer jurisdiction on the court to adjudicate whether or not any fee is payable.

The holding of Rashap v. Brownell, 229 F. 2d 193 (C.A. 2, 1956), is not relevant to the case at bar. In that case it was held to be an abuse of discretion to deny plaintiff leave to file a supplemental complaint, or a crossclaim, against a property owner who had intervened as defendant with the consent of all parties, where an almost complete record had already been formed. There is a great difference between a denial of leave to file a crossclaim between parties within the jurisdiction of the court where such denial merely "postpones to another day a dispute rather thoroughly explored already" (229 F. 2d at 196), and the denial of an application for intervention which proposes to introduce a cause of action not before the court, without service of process on the alleged obligor, and where the court does not have jurisdiction to render judgment. The court in Rashap was not concerned with intervention under Rule 24, but whether to relinquish control and jurisdiction of the parties already before it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or that the order of the court below should be affirmed.

CARL EARDLEY,
Acting Assistant
Attorney General,

SHERMAN L. COHN,
LAWRENCE A. KLINGER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

DECEMBER 1964.

BRIEF FOR APPELLEE,
SOCIETE INTERNATIONALE, etc.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,939

ROBERT A. SCHMITZ, *Appellant*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, as Successor to the Alien Property Custodian, et al.

and

SOCIETE INTERNATIONALE, ETC., *Appellees*

Appeal From the United States District Court for the District of Columbia

JOHN J. WILSON
815 – 15th Street, N.W.
Washington 5, D.C.
Attorney for Appellee,
Societe Internationale, etc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

In the opinion of both appellees, the

QUESTION PRESENTED is—

Whether one who claims a wholly disputed fee from a non-resident foreign corporation may intervene, on the basis of Section 20 of the Trading with the Enemy Act, as party plaintiff in the corporation's statutory proceeding, brought under Section 9(a) of the Trading with the Enemy Act against the Government, in order to litigate his claimed fee in that action and thereby obtain an *in personam* judgment against plaintiff corporation without service of process upon it, and if successful therein to sequester funds in the hands of the Government.

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

STATUTES, ETC.

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Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE, SOCIETE INTERNATIONALE, etc.[1]

COUNTERSTATEMENT OF THE CASE

Appellant has cautiously omitted to inform this Court that appellee, Societe Internationale (hereinafter called Interhandel), disputes in their entirety the claims of ap-

[1] This brief is written with the objective of avoiding, as much as possible, repetition of the text of the co-appellee's brief, in which the appellee, Societe Internationale, etc., fully concurs.

pellant for fees.[2] (See Interhandel's memorandum below in opposition to application for intervention, page 2; Judge Pine's memorandum opinion, JA 29; and transcript of argument before Judge Pine on June 24, 1964, page 53.)

To the opposite effect and quite erroneously, in appellant's second Question Presented, it is averred that appellant's fees "are due and owing"; on page 1 of appellant's brief, the fees are referred to as "due to appellant", and on page 2 as "payable to appellant"; and in the first paragraph of the Argument in appellant's brief (page 13), it is asserted that "it must be taken as true that Interhandel is obligated * * * to pay appellant".

Appellant's motion below seeks to name himself as a plaintiff (JA 6), and his tendered complaint in intervention is entitled "for a money judgment" against Interhandel (JA 7),[3] the relief sought by the first prayer of the proposed complaint being to

> "give him judgment against Interhandel A.G. (a) on the First Claim for Relief, in an amount equal to 5% of such monies as Interhandel shall receive as its share of the proceeds of the sale of the GAF stock, and (b) on the Second Claim for Relief, in the sum of $112,000, plus interest from December 31, 1961; and (c) for the costs of this action;" (JA 12)

Thus, a judgment *in personam* is sought against Interhandel. Interhandel has not been served with original

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[2] Appellant's incredible principal claim is for a "finder's fee" (see Judge Pine's opinion, JA 29) of 5 per cent of this appellee's recovery—5 per cent would equal some millions of dollars—for the mere introduction of Mr. Charles E. Wilson (formerly of General Electric Company) to officials of Interhandel (JA 9-10). This alleged agreement, being in no wise dependent upon Mr. Charles Wilson's success on Interhandel's behalf, is admittedly not supported by any written document (JA 10, para. 9).

[3] The caption of the proposed complaint in intervention is not printed at JA 7. It is in the record on appeal and, in addition to the usual caption by which the main case is always described, a second caption is appended, in which appellant is described as plaintiff-intervenor (giving his residence address as Greenwich, Connecticut), and in which Interhandel and the Treasurer of the United States appear as defendants.

process by appellant and there is no intention to do so. Indeed, Interhandel, being a non-resident Swiss corporation, with no place of business in the United States, cannot be personally served here.

Intervention under Rule 24 F.R.Civ.P., and a distorted construction of Section 20 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 20), are invoked by appellant in attempting to overcome the need for obtaining personal jurisdiction over Interhandel, despite the fact that a trial must be had over the issue as to whether Interhandel owes the claimed fees to appellant.

This is not the typical case where the tendered complaint in intervention might be accepted as *prima facie* true, for purposes of gauging the right to intervention. Appellant concedes that Interhandel will not voluntarily pay his fees or submit them to the Court for consideration under Section 20 of the Trading with the Enemy Act. (See Second Question Presented.) In other words, unlike the usual case, in which the intervention is to accomplish a direct purpose, appellant in the case at bar first has to obtain a judgment against Interhandel before he can have his fee considered under the provisions of Section 20.

Thus, appellant turns the normal situation around, and seeks to use Section 20 as the medium for litigating his claim against Interhandel without service of process, instead of proceeding in the usual way first to recover a judgment against Interhandel after having served Interhandel in the manner required to obtain a personal judgment against an alleged debtor.

Present Status of the Main Action in the District Court

At the request of appellees and consenting intervenors (those who acquiesced in the settlement), Judge Pine, the special Judge for the entire *Interhandel* case, entered a three-phase order below, the effect of which is as follows: (1) finding that the rights of some 60 non-consenting in-

tervenors (these are all who remain), are fully protected by the terms of the settlement; (2) finding that there is no class action among the stockholders-intervenors; and (3) dissolving an injunction in favor of appellee, Interhandel, against the Attorney General, which stood in the way of the proposed recapitalization of General Aniline & Film Corporation (JA 5-6).

Judge Pine declined to pass upon the fairness or propriety of the settlement, and appellees have no fault to find with this attitude. While appellees envisaged the ultimate entry of a consent judgment, Judge Pine has so far not acquiesced in this move, and indeed, has questioned the need therefor, even to the extent of suggesting to appellees that they contract for an alternative disposition of the case by dismissal with prejudice pursuant to praecipe of the parties (JA 4-5). The parties so amended their Stipulation of Settlement (JA 3). If Judge Pine will not enter a consent judgment, appellees will accept such attitude without complaint and execute a stipulation of dismissal with prejudice. Despite the fact that he is not involved in such proceedings, appellant collaterally attacks Judge Pine's attitude in this respect.

Judge Pine's Opinion Upon Appellant's Application

Judge Pine met appellant's contentions head-on, describing them as involving "the sole question * * * whether he [appellant] may now litigate *in this action* his claims against Interhandel." (JA 29). First, he told appellant that he could not intervene in the statutory action under Section 9(a) of the Trading with the Enemy Act, since he has no interest in the vested property (JA 30).

Next, the lower court concluded that appellant's claim could not be based on a lien upon the vested property (this point, while urged below, has been abandoned by appellant in this Court); and that an attorney has no lien for a fee for his services under the Act (JA 30).

Thirdly, Judge Pine pointed out that he may never enter a judgment in the case for the settlement terms, and thus he may never have any function under Section 20 of the Trading with the Enemy Act (JA 31).

Then, the Judge struck at the very heart of the contention made by appellant in this appeal, stating:

> "* * * Sec. 20 is not a provision for the *judicial* determination of fees, as movant seems to assume, but is a statute to protect the owner of seized property from unreasonable or extortionate charges in seeking its recovery. (*Kroll* v. *McGrath*, 91 U.S. App. D.C. 172.) It, therefore, provides no basis for intervention." (JA 32)

Finally, Judge Pine concluded that for all the reasons set forth in his opinion, appellant is not qualified to intervene as a plaintiff under Rule 24(a) and (b) F.R.Civ.P., either of right or permissively, nor should he be joined as an indispensable party pursuant to Rule 19(a) F.R.Civ.P. (JA 32). (This latter effort is likewise abandonment in this Court.)

STATUTES, ETC.

50 U.S.C. App. 20, as amended June 25, 1956, c. 436, 70 Stat. 331.[4]

> "No property or interest or proceeds shall be returned under this Act, nor shall any payment be made

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[4] A comparison with the prior statute is informative.

The prior statute required a schedule of fees to be furnished and approved by an administrative governmental officer, or the court, as the case may be (meaning, of course, whether or not a judgment was entered). The second sentence of the prior statute provided that the administrative officer "*may make such modifications, if any, as are appropriate and shall approve such schedule only upon determining that the individual fees do not exceed fair compensation for the services rendered and* that the aggregate of the fees does not exceed 10 per centum of the value of such" returned property or interest or proceeds or of such payment. (This sentence expressly excluded returns, payments, etc., "pursuant to an order of court".) Any person aggrieved by a determination, as aforesaid, may petition the District Court at the place of such person's residence for a review. The governmental officer must be named as a party defendant. Such court, or any court awarding a judgment for return, payment, etc., [then follows repetition of the exact language which is in italics herein]. [The section concludes with the exact language as appears in italics in the *present, amended statute.*]

or judgment awarded in respect of any property or interest vested in or transferred to any officer or agency of the United States under this Act unless satisfactory evidence is furnished to the President or such officer or agency as he may designate, or the court, as the case may be, that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment. Any agent, attorney at law or in fact, or representative, believing that the aggregate of the fees should be in excess of such 10 per centum may, in the case of any return of, or the making of any payment in respect of, such property or interest or proceeds by the President or such officer or agency as he may designate, petition the district court of the United States for the district in which he resides for an order authorizing fees in excess of 10 per centum and shall name such officer or agency as respondent. The court hearing such petition, or a court awarding any judgment in respect of any such property or interest or proceeds, as the case may be, *shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of fee, accepted prior to approval hereunder, in excess of the fee as approved, shall be guilty of a violation of this Act.*'' (Italics supplied for purpose of footnote 4.)

SUMMARY OF ARGUMENT

In order to intervene in a Section 9(a) suit appellant must meet the jurisdictional requirements set forth in the Act. Appellant does not have any interest in the vested property, as is required by Section 9(a), nor may he claim an interest in the nature of a lien since liens are specifically barred by Section 9(f) of the Act.

Section 20 requires the District Court to make a finding of special circumstances of unusual hardship before aggre-

gate agreed-upon fees in excess of 10 per centum of the recovery may be paid. It does not provide a forum for the adjudication of contested fees. A contest over fees must be tried in the usual way by an original adversary proceeding, predicated upon personal service of process and resulting in an *in personam* judgment against the client. Intervention, with service upon the client's local counsel, is not adequate.

Appellant has failed to meet the requirements for intervention as set forth in Rule 24 of the Federal Rules of Civil Procedure in that he will not be bound by a Section 20 determination (24(a)(2)); he will not be adversely affected by the disposition of property in which he has no interest (24(a)(3)); and his claim presents no question of law or fact in common with the main litigation.

ARGUMENT

There Is No Section 20 Function Now Before Judge Pine, and There May Be None; Analysis of Section 20

Since no judgment has been entered upon appellees' settlement, and since Judge Pine has indicated that there may be none, appellant has no such predicate upon which to base intervention, assuming, *arguendo*, that all other elements were present. This has been shown in the Counterstatement of the Case in this brief, under the title "Present Status of the Main Action in the District Court".

Appellant's entire argument is based upon the existence of such a function on Judge Pine's part.

Appellant's reliance upon a quotation from a joint memorandum of appellees, filed with Judge Pine below (see appellant's brief, pages 14-15), is wholly misplaced, since the quotation shows clearly that, in two places, appellees stated that Judge Pine's function under Section 20 *only* would arise where a judgment is entered.

In pushing his argument beyond bounds, appellant equates a consent judgment with a joint praecipe of dis-

missal with prejudice filed by the parties. (See appellant's brief, page 15.) The fact that such dismissal may be *res judicata* is irrelevant to this appeal since Section 20 involves an express statutory prescription which requires the entry of a judgment before the District Court must receive satisfactory evidence that the fees are not in excess of 10 per cent. The text clearly shows that payment or return triggers administrative action only, except as set forth in the second part of the section which relates to situations where the fee of an agent causes the aggregate of the fees to exceed 10 per cent.

There is no showing on the part of appellant that his alleged fees of 5 per cent plus $112,000 would cause the aggregate of the fees to exceed 10 per cent. This cannot be known until the proceeds of the sale of the General Aniline stock are ascertained. Such sale has not yet taken place.

Appellant entirely misconceives the functioning under Section 20, both when the aggregate of the fees does not exceed 10 per cent and when it does exceed 10 per cent. Instances of such misconception, appearing in appellant's brief, are listed as follows:

On page 1: "No such fees may be paid which are not approved under section 20."

On page 2: "In winding up a statutory TWEA proceeding the court must review agents' and attorneys' fees in accordance with section 20 of the Act."

On page 2: "If the fees claimed total more than ten per cent, the court must examine the reasonableness of each fee." (This is repeated on pages 10 and 13.)

On page 19: "Since section 20 TWEA bars the receipt of a fee which is not approved in a section 20 proceeding • • • "

It may be well at this point to contrast Section 20 before and after the 1956 amendment. The prior statute expressly

provided for approving *individual* fees subject to the test of fair compensation (reasonableness), whether aggregating more or less than 10 per cent. *In addition,* if the aggregate exceeded 10 per cent, the test of "special circumstances of unusual hardship" had to be applied by the court with respect to the excess. The present statute does not mention approval for any purpose at all under an aggregate of 10 per cent, and nowhere must individual fees be examined, either as such, or on the basis of reasonableness.

Since almost the entire scheme of the prior statute has been superseded, it is submitted that appellant is not justified in transplanting to the current section ideas relating to reasonableness of individual fees. After applying the 10 per cent test, the remaining criterion for the court is the existence or non-existence of special circumstances of unusual hardship in respect of an excess. The Court does not sit in judgment upon the question as to whether the fee is fair and reasonable. This has been circumvented either by a willingness on the part of the claimant to pay, or a judgment entered by a court of competent jurisdiction requiring him to pay.

Thus, the assertion of appellant that no fees may be paid which are not approved under Section 20 is plainly writing something into the statute which does not exist. Next, baldly to assert that, "In winding up a statutory TWEA proceeding" the Court must review fees, is equally in error. And, lastly, appellant's contention that the Court must examine the reasonableness of each fee, where the aggregate claimed exceeds 10 per cent, is without foundation in the statute.

To recapitulate this appellee's construction of the statute, fees not exceeding 10 per cent do not have to be approved by anyone, whether judge or administrative officer. If the aggregate of fees exceeds 10 per cent, the Court must approve the excess solely on the basis of "special circumstances of unusual hardship". If the claimant has

advanced no fees and the total of all fees exceeds 10 per cent, there is no requirement of a prorating of all fees; instead, the Court can determine that one or more of them do not meet the test of "special circumstances of unusual hardship". If, on the other hand, the claimant has already paid fees which equal 10 per cent, and if an additional agent or attorney comes along who claims a fee, either by judgment or by the willingness of the claimant to pay, it is the agent who has the duty under the Section to petition the District Court of the district of his residence for the payment of such excess. It is only he who, accepting a fee in excess of that which is approved over 10 per cent, must be sure not to accept a fee beyond the amount of the excess so fixed.

Appellant complains that a proceeding instituted by him in the district of his residence would not reach appellee Interhandel, but only would be an adjudication to which the Government would be the other party. This is quite true because the purpose of the statute is to protect the claimant from unreasonable or exorbitant fees. Appellee Interhandel does not need such protection now, because it will not voluntarily pay appellant's claims, and its liability to do so has not been fixed by a court of competent jurisdiction. If it should be so fixed, then the proceeding in appellant's home district would not need Interhandel as a party.

Section 20 Does Not Provide the Vehicle for Avoiding Fundamental Considerations

Judge Pine stated in his opinion (JA 32):

> "* * * * Sec. 20 is not a provision for the *judicial* determination of fees, as movant seems to assume, but is a statute to protect the owner of seized property from unreasonable or extortionate charges in seeking its recovery. (*Kroll* v. *McGrath,* 91 U.S. App. D.C. 172.) It, therefore, provides no basis for intervention."

As this appellee has pointed out in its Counterstatement of the Case, at the beginning of this brief, appellant

sought below to be admitted into the pending Section 9(a) proceeding as a plaintiff in order to maintain an adversary proceeding against this appellee to obtain an *in personam* judgment for the amount of his alleged fees, and to collect the same from funds in the hands of the U.S. Treasurer.

It has been demonstrated in co-appellee's brief, and is reiterated here by this appellee, that appellant has no interest in the vested property, nor a lien thereon (*Berger* v. *Ruoff*, 90 U.S. App. D.C. 276, 195 F.2d 775, *cert. denied*, 343 U.S. 950 (1952)), and thus has no standing to become a plaintiff in the statutory (Section 9(a) of the Trading with the Enemy Act) proceeding which was instituted and maintained below by this appellee against the Attorney General and the Treasurer of the United States. (*Kaname* v. *Clark*, 71 F.Supp. 1, aff'd 172 F.2d 384, *cert. denied*, 337 U.S. 937; *Von Opel* v. *Uebersee Finanz Korporation*, (1955) 96 U.S. App. D.C. 230, 225 F.2d 530) As also established by co-appellee's brief, and as elsewhere maintained herein by this appellee, the Federal intervention rule (Rule 24(a) and (b)) provides no basis *per se* to support appellant's application for intervention.

This leaves then the sole proposition, if appellant is to succeed, that Section 20 of the Trading with the Enemy Act, as amended, must afford the complete vehicle for appellant to sue this appellee in this statutory proceeding to obtain an *in personam* judgment without independent service of process.

Unlike the counterclaim cases[5] it cannot be successfully maintained that this appellee submitted itself to the jurisdiction of this Court to be a defendant-target *via* intervention for any fee claimant to come in and seek to recover a judgment, not on the basis of *in rem*, or *quasi in rem*, but on the basis of *in personam* liability.

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5 Cummings v. Societe Suisse pour Valeurs de Metaux (1936) 66 App. D.C. 121, 85 F. 2d 287; Isenberg v. Biddle (1942) 75 U.S. App. D.C. 100, 125 F. 2d 741.

This is not a case like the Remington Rand intervention which is referred to in footnote 2 on page 21 of appellant's brief. In that case, as mentioned in the footnote, Remington Rand's complaint sought an affirmative judgment for the GAF shares against the governmental defendants. Indeed, the introductory paragraph of the tendered complaint of intervention stated:

> "Intervenor above named, by leave of court first had and obtained, files this, its Complaint of Intervention against the above-named defendants [Attorney General and Treasurer of the United States]." (See Joint Appendix in this Court case No. 10,739, page 2.)

This Court's opinion in *Remington Rand, Inc.* v. *Societe Internationale, etc.,* (1951) 88 U.S. App. D.C. 275, 188 F.2d 1011, stated at page 276:

> "Accordingly, Remington Rand prayed for a judgment declaring it to be entitled to the stock when the conditions were fulfilled and that Interhandel be restrained and enjoined from disposing of the same."

Thus, the relief sought against the governmental defendants by Remington Rand came within the statutory scheme of Section 9(a) (of the Trading with Enemy Act, claiming an interest in the vested property. The injunctive relief sought against Interhandel was not only incidental to the statutory proceeding but was wholly meaningless because the stock having been vested in the Attorney General, entire title was reposed in him under Section 12 of the Trading with the Enemy Act (50 U.S.C. App. 12), and there was no legal theory upon which Interhandel could dispose of the same.

Rashap v. *Brownell,* 229 F.2d 193 (2 Cir. 1956) (appellant's brief pp. 20-21) is equally inapposite. In that case the property claimant intervened as a defendant, and thus became a perfect target for the cross-claim which the plaintiff therein asserted against it. It is wholly inaccurate to assert, as appellant did at the top of page 21 of its brief, that the defendant-intevenor in *Rashap* was "in the position of Interhandel in the case at bar". Interhandel has not

submitted itself to the jurisdiction of the court in a case in which appellant was an existing party.

Aratani v. *Kennedy,* (D.C.D.C. No. 3164-58) 228 F. Supp. 706 (1964), a decision by District Judge Walsh, heavily relied upon by appellant in his brief (pp. 17-18) and Supplement thereto, bears no resemblance to the case at bar or to the status of appellant. This was a class action in which the proposed compromise had to be and was approved by Judge Walsh pursuant to Rule 23(c). The case has been thoroughly dealt with in co-appellee's brief.

Appellant contends that Section 20 provides the vehicle and forum for the determination of *contested* fees. Obviously, the very opposite is true. Section 20, like similar other statutes affecting claims against the United States, is designed to protect the claimant against being gouged by voluntarily paying excessive amounts for fees.

The decision of this Court in *Kroll* v. *McGrath,* (1952) 91 U.S. App. D.C. 172, 199 F.2d 187, points up this real purpose of Section 20. At page 174 of 91 U.S. App. D.C., this Court said:

> "The statute is manifestly designed to protect the owner seeking restoration of seized property from unreasonable or even extortionate fees for services."

The section envisages a willingness on the part of the client to pay, and a limitation on the part of the legal representative to accept, sums in excess of 10 per cent. As pointed out in the preceding chapter of the Argument in this brief, the latter part of Section 20, covering the situation where the aggregate of fees exceeds 10 per cent relied upon by appellant here, does not call upon the court to pass upon even the reasonableness of a charge for services rendered, but merely whether special circumstances of unusual hardship require the primary ceiling of 10 per cent to be penetrated for payment.

This appellee feels that appellant's position can be fairly stated as follows: His claim for millions of dollars for a finder's fee for a mere introduction may, when added to the

fees paid or agreed to be paid by Interhandel, exceed 10 per cent of Interhandel's share in the sales proceeds of the GAF stock, therefore the District Court should have the entire package of fees before it at one time, either to grant relief above 10 per cent or to pare down everyone's fees, when appellant's is included, to a 10 per cent maximum. This, appellant says, can only be done by first adjudicating his claim in the same proceeding as a prerequisite to functioning under Section 20.

Of course, such a contention is absurd. It has the cart pulling the horse. A willingness on the part of the client to pay, or a judgment adjudicating the debt, must first be established. This latter contemplates proper jurisdiction over the claimant-debtor and trial of the issue. Then, if there be a recovery, and if it causes the aggregate of fees to exceed the 10 per cent primary limit, Section 20 provides a forum for appellant in the district of Connecticut where he resides.

Interhandel did not submit to the jurisdiction of this Court to litigate claims of third parties. "Person by becoming suitors do not place themselves for all purposes under the control of the Court." *Reynolds* v. *Stockton*, 140 U.S. 264, 268, 35 L.ed. 464, 469. And even though an action be pending based upon personal service of process, there is no jurisdiction for the assertion of a new claim, without like service of process. *In re Indiana Transportation Co.*, (1917) 244 U.S. 456, 61 L.ed. 1253.[6] *Cf. Hansberry* v. *Lee*, 311 U.S. 32, 40, 85 L.ed. 22, 26.

The doctrine of ancillary jurisdiction, apparently relied upon by appellant in his instant motion, applies only to questions of jurisdiction and not to service of process.

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[6] Professor Moore's "*quaere*" as to whether this case is good law since the adoption of the Federal Rules of Civil Procedure in 1938 (see 4 Moore's Federal Practice, paragraph 24.20), may be answered by Rule 82 F.R.Civ.P. which provides that the Federal Rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. See *Pearce* v. *Penna. R. Co.* (3 Cir. 1947) 162 F.2d 524, 528.

See *Barron & Holtzoff*, Section 23 (p. 102), citing *Lasch* v. *Antkies*, (U.S.D.C.E.D. Penna. 1958) 161 F.Supp. 851. See also *Pearce* v. *Penna. R. Co.*, (3 Cir. 1947) 162 F.2d 524, 528; *Moreno* v. *United States*, (1 Cir. 1941) 120 F.2d 128; *Kappus* v. *Western Hills Oil Co., Inc.*, (U.S.D.C.E.D. Wisc. 1959) 24 F.R.D. 123; and *Phillips* v. *Murchison*, (U.S.D.C.-S.D.N.Y. 1961) 194 F.Supp. 620.[7]

It is hardly a proper substitute for fundamental considerations of jurisdiction that appellant offers either platitudes or considerations of expediency. This appellee refers to page 21 of appellant's brief where he says that his scheme is not "unfair or improper"; that it serves the convenience of everyone; and that it is no imposition on the Court since the Court exists to adjudicate.[8] Appellant adds,

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[7] The following cases, cited below by appellant in response to this contention of this appellee, are easily distinguished: *Berman* v. *Herrick*, 30 F.R.D. 9 (E.D. Penna. 1962); *Lens* v. *Wagner*, 240 F.2d 666 (5 Cir. 1957); and *Goldlawr, Inc.* v. *Heiman* (1962) 369 U.S. 463, 8 L.ed. 2d 39. The district judge in *Berman* found himself entirely consistent with the earlier ruling in the same court by another judge in *Lasch* v. *Antkies, supra*, in that, in that case, the amended complaint, which was sought to be asserted by way of intervention, contained an entirely different cause of action which could not have been properly served originally by the method used in serving the original complaint. The contrary was true in the *Berman* case. In the *Lens* case, the argument was made by the defendant named in the proceeding that the court lacked jurisdiction over her in respect of an intervenor's counterclaim. While the contention was made that the court lacked jurisdiction over the person of the defendant, this was because the original cause of action wherein she was made a party defendant had previously been finally disposed of. The issue turned upon jurisdiction of the court over the subject matter, namely, a compulsory counterclaim, and not lack of jurisdiction over the person which is contended for by this appellee. In the *Goldlawr* case, the question involved did not even remotely resemble the question in our case. It involved the federal provision for transferring cases from one federal district to another, and the transfer was being made to the district where the defendants could be personally served with original process. The fact that they could not be served in the district where the suit was originally instituted is obviously unimportant since their rights would be fully protected by personal service in the district to which the case was being transferred.

[8] This assortment is embellished by the assertion that appellant helped to make this appellee's recovery possible and that he was promised payment out of such recovery. These two contentions are just as vigorously controverted by this appellee as are the claims of appellant themselves.

under this same pretext, that he has nowhere else to go, even for an award conditioned on subsequent approval under Section 20; that he cannot obtain jurisdiction over Interhandel or its property in the United States other than by this intervention; and that he would be severely disadvantaged if he were required to bring a suit abroad.

Appellant's difficulty to select the proper court in which to sue Interhandel is not unique in the case of a foreigner. Appellant concedes that he dealt in Europe with a European. (See allegations of the tendered complaint, particularly JA 10 and 11.) It would not be shocking if appellant had to litigate his claim in Europe. Once he obtained a final judgment against this appellee in Switzerland, he could proceed under Section 20, if the aggregate of all fees then exceeded 10 per cent, to petition the District Court in Connecticut—the place of his residence—for an approval upon the ground of unusual hardship. Under the statute the Attorney General would be the only one required to be named as respondent. At that point, appellant would presumably have a valid Swiss judgment and, with proper treatment under Section 20, could lawfully proceed to collect upon the judgment in Switzerland, either by simple demand or by appropriate execution.

Appellant Has Presented No Valid Ground for Intervention Under the Rules

Appellant relies upon Rule 24(a)(2) and (3) for intervention as a matter of right, and upon Rule 24(b)(2) for permissive intervention. On this appeal, he further charges Judge Pine with an abuse of discretion in allegedly failing to consider his grounds for permissive intervention.

It is the position of this appellee, as it is that of its co-appellee, that Judge Pine was entirely correct in denying intervention upon every theory proposed by appellant (JA 32). Since our co-appellee has dealt extensively in his brief with this area of appellant's contentions, and since this appellee concurs in all the arguments of its co-appellee,

repetition will be avoided by not covering the same ground herein. Consequently, this appellee will confine itself to several remarks.

As to appellant's contention that he will be bound by the so-called Section 20 determination (Rule 24(a)(2)). Appellant's distortion and misuse of Section 20 is the false premise for this argument on his part.

Assuming, *arguendo,* that Judge Pine will function under Section 20—this is not factually so at this time, as pointed out above—the Judge will not even approve "an aggregate of fees under ten percent", since the statute does not require it, nor will he approve "the amount of each fee", if the fees claimed total more than ten per cent. (See appellant's brief, page 22.) Accordingly, appellant will not be prevented from bringing an independent action first to litigate with appellee Interhandel his claim to the fees, and then, if successful, to have the fee approved by the District Court in Connecticut (the place of appellant's residence) if the amount thereof, added to the fees which appellee Interhandel voluntarily has already paid or desires to pay, exceeds 10 per cent.

Cases relied upon by appellant are not in point. This appellee will specifically comment only upon one of them, the others being fully discussed in co-appellee's brief.

Ducker v. *Butler,* 70 U.S. App. D.C. 103, 104 F. 2d 236 (1939) (appellant's brief page 23) was, in effect, a case of interpleader in which everyone who had an interest in a definite appropriated sum, had to be joined. Indeed, in that case the aggrieved party was named as a defendant but no attempt was made to serve him. No such situation exists here. That case was a clear one involving an indispensable party. Appellant has a complete remedy elsewhere, and his non-joinder in the case at bar imperils nothing and nobody. Of course, there is no absolute sum here set aside by law for fees. Section 20 affords much judicial flexibility.

As to appellant's contention that he will be adversely affected by the distribution of property which is subject to the control of the Court (Rule 24(a)(3)). This appellee wishes to make a single observation. Regardless of the question as to whether vested property is, ordinarily, "in the custody or subject to the control or disposition of the court" in a Section 9(a) suit, no such status exists here in view of the terms of the Settlement Agreement between appellees. The lower court has no supervision whatsoever over the disposition of the vested property at this time, since this is deliberately left to the appellees under the settlement contract, except, possibly regarding the some sixty non-consenting intervenors, and appellant has no claim in relation to property escrowed for their protection.

As to appellant's application for permissive intervention (Rule 24(b)(2)), and the charge that Judge Pine entirely ignored the grounds therefor. Appellant's brief gives little space to this point. He feebly tried to meet the test of common questions of law and fact by resorting to his defective premise that he is entitled to be paid and thus be included in the Section 20 computations. Judge Pine recognized this major defect when he stated that appellant could not intervene under *either* Rule 24(a) or (b) "f[F]or the reasons above set forth" (JA 32).

Finally, appellant asserts (brief, p. 28) that "nothing in the Court's opinion gives any indication that it addressed these issues to all". This is appellant's support for the charge of abuse of discretion in order to form the basis for an appeal from the denial of *permissive* intervention.

This is desperation at its zenith. Judge Pine stated, in effect, that he weighed the considerations offered for permissive intervention and found them without merit. Appellant is thus maintaining that Judge Pine was wrong fundamentally, and hence wrong in the exercise of his discretion. This is nothing more than a "boot-straps" argument.

CONCLUSION

The court below properly decided that appellant could not intervene as a party plaintiff; that the court lacked jurisdiction to entertain appellant's claim; that Section 20 does not provide for judicial determination of fees and, therefore, provides no basis for intervention; and that appellants did not meet the requirements of Rule 24(a) and (b), Federal Rules of Civil Procedure. Moreover, this appellee did not submit itself to the jurisdiction of the District Court for the recovery of an *in personam* judgment in an adversary proceeding over an agent's contested fee demand. The order of the District Court denying appellant's motion should, therefore, be affirmed.

Respectfully submitted,

JOHN J. WILSON
815 - 15th Street, N.W.
Washington 5, D.C.

Attorney for Appellee,
Societe Internationale, etc.

December 11, 1964.

REPLY BRIEF FOR APPELLANT
AND ADDITIONAL SUPPLEMENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,939

ROBERT A. SCHMITZ,

Appellant,

v.

NICHOLAS deB. KATZENBACH,
Acting Attorney General of the United States,
and

SOCIETE INTERNATIONALE, etc.,

Appellees

Appeal From an Order of the
United States District Court for the
District of Columbia

ROBERT M. HAUSMAN
One Farragut Square South
Washington, D. C. 20006
Counsel for Appellant

DAVID GINSBURG
HAROLD LEVENTHAL
Of Counsel

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REPLY BRIEF FOR APPELLANT

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Table of Cases:

** Cases chiefly relied upon are marked by asterisks.*

ARGUMENT

This appeal is before the Court on appellant's Complaint in Intervention, reciting that he spent eighteen months in an ultimately successful effort to carry out a commission for Interhandel, for which Interhandel promised to pay him a fee out of any recovery it might obtain with respect to its vested property. Interhandel in its brief characterizes these allegations as incredible, and asserts that it disputes them.

The place to determine whether factual statements in the Complaint are credible or not — that is, whether they are supported by a preponderance of the evidence — and the place to dispute those statements, is at a trial of the facts — a trial which Interhandel has thus far sought to avoid by every available procedural maneuver. Appellant hopes to persuade the trier of fact that Interhandel, at the time it entered into its contract with appellant, thought that what it expected to receive was well worth what it was promising to pay. Whether the facts are disputed is immaterial on the motion to intervene. Indeed, it would seem that if the appellant presents a claim for fees which Interhandel intends to dispute, Interhandel should itself present this fact in a section 20 proceeding, and ask the Court to bring in the appellant and resolve the dispute. That Interhandel will not do so is the reason that the appellant must intervene. Appellant seeks only to obtain a trial of his cause, on the merits, in the obviously appropriate forum.

The District Court Has Subject-matter Jurisdiction of Appellant's Cause.

Appellees argue that in order to intervene in this suit, appellant must "meet the jurisdictional requirements set forth in the [Trading with the Enemy] Act." Why? Appellant's claims for relief are not grounded in any rights given by the Act, but in the common law of contract and quasi-contract. Appellant is not a plaintiff in a TWEA suit; he

does not seek a return of property from the Government. Rather, appellant is a cross-claimant against Interhandel, like the party who was permitted to file a cross-complaint for services against an alien property claimant in *Rashap v. Brownell*, 229 F.2d 193 (2d Cir. 1956).

The court's subject-matter jurisdiction of appellant's claims is ancillary, because those claims must be adjudicated as a necessary and proper element of the section 20 TWEA proceeding, and to do complete justice in that proceeding. *Cf. Walmac Co. v. Isaacs*, 220 F.2d 108, 113-14 (1st Cir. 1954). Even constitutional limits on subject matter jurisdiction do not bar such ancillary claims. *Waylander-Peterson Co. v. Great Northern R. Co.*, 201 F.2d 408 (8th Cir. 1953) (lack of diversity of citizenship as to third-party claim). No independent federal ground of subject matter jurisdiction is needed. Moore's Fed. Prac. (2d ed. 1963) ¶ 24.18. *A fortiori*, no basis in a particular federal statute is needed.

The Remington Rand intervention, resulting in a full trial of the merits, was on a similarly ancillary claim. It was not a section 9(a) TWEA suit, and it could not have been one because Remington Rand's interest arose subsequent to vesting and, as the Government's brief on this appeal correctly states (p. 9), no such post-vesting "interest" in the vested property is recognizable under section 9(a). Interhandel's characterization of the Remington Rand complaint (Interhandel brief, p. 12) is erroneous. To show that Remington Rand's quarrel was with Interhandel, and not with the Government, one need only note that the gravamen of the complaint was breach by Interhandel of its contract with Remington Rand, and the prayer for Relief:

> "WHEREFORE, Intervener demands:
>
> "(1) That pending further order of this Court, the plaintiff be restrained and enjoined from disposing of any right, title or interest in and to the shares of stock described in the fourth paragraphs of Counts One and Two of the original Complaint herein.

> "(2) That, if this Court finds that the plaintiff is entitled to the return of the shares of stock described in the fourth paragraphs of Counts One and Two of the original Complaint herein, the Intervener be entitled to establish its right, title and interest in and to said shares of stock.
>
> "(3) That, if Intervener shall establish its right, title and interest in said shares of stock, judgment be entered for Intervener therefor, and for such other and further relief as to this Court may seem just and proper."

Thus, Remington Rand prayed that **after** Interhandel won its section 9(a) suit, judgment be entered for Remington Rand. Such a judgment would have been against Interhandel, at that point the only party claiming ownership. The Government would not have been affected, except perhaps as a stakeholder.

Ancillary to the main case, not asserting any right grounded in the Trading with the Enemy Act, and accomplished without any new service of process, the Remington Rand intervention is an exact precedent for the appellant's.

In Exercising Its Functions Under Section 20, the District Court Should Have Before It, Insofar as Possible, All Claims for Fees, for Only in This Way Can Its Determination Fully Effectuate the Purpose of the Section and at the Same Time Do Justice Among the Fee Claimants.

It is true that section 20 of the Trading with the Enemy Act does not require apportionment of fees in each and every case. Similarly, it does not require a determination that the fees claimed are reasonable in each and every case. But the decision that no apportionment or no determination as to the reasonableness of fees is required can only come at the end of the section 20 proceeding. It is a conclusion, not a premise.

For example, if the fees claimed (including those already paid) total more than ten percent of the recovery, the court must examine the reasonableness of each fee. If it decides that the aggregate of reasonable fees exceeds ten percent, it may nevertheless refuse to make the finding of hardship necessary to breach the ten percent ceiling. In such a case, the court must apportion the ten percent available among the fee claimants. On the other hand, the court may find hardship, and allow an aggregate of fees greater than ten percent, awarding each claimant a fee no higher than it finds to be reasonable. *In re Annemarie Proebsting*, Civil 148-311 (S.D.N.Y. 1959) (not reported, but included in the Supplement hereto), shows that the standard of "fair and just compensation" survives the 1956 amendment when the aggregate of fees claimed exceeds ten percent of the recovery. There, the court said:

> "The authority given for application to the court for fees in excess of 10% of the value recovered 'upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess' **contemplates the award of fair and just compensation** where such circumstances are shown to exist." (Emphasis added) Supp. pp. 11-12.

This analysis of the District Court's duties under section 20 means that only if all fee claims are before it can the court effectuate the policy of the section to protect owners of vested property from excessive fee payments while, at the same time, doing justice among fee claimants. To illustrate, assume that in the instant case the aggregate fees, excluding appellant's, are less than ten percent, but that if appellant's fee is included the aggregate of fees claimed will exceed ten percent.[1] On this assumption, if all the claims, including appel-

[1] This is not an unlikely assumption in the instant case, where appellant's claim is for more than one half of the ten percent aggregate allowable automatically under the statute. Moreover, the question of "hardship" in this case is a difficult one. The proceeds to Interhandel will be about $80 million before deductions for taxes and dividends which it owes the Government, and about $56

(*Continued on next page*)

lant's, are before the district court in the section 20 phase of the proceeding, the court will have before it the whole range of options contemplated by the section. It may decide that appellant's fee is unreasonable and disallow such portion of it as may be necessary to maintain the ten percent ceiling. But equally, it may find other fee claims unreasonable and reduce them, perm itting appellant to make full recovery on his claim within the ten percent ceiling. Or, the court, after assessing the reasonableness of all the claims, may decide that though the aggregate of reasonable fees exceeds ten percent there is no "hardship" to warrant a breach of the ten percent ceiling; it would then apportion the ten percent available for fees among the claimants on some equitable basis. Finally, the court might decide to allow fees in excess of ten percent on some formula that adjusts the equities among the fee claimants and the property owner.

If, on the other hand, the appellant were excluded from the section 20 phase of the proceedings below and remitted to a subsequent action in the District of Connecticut, that court would not have all the options which should be available under section 20. If the Connecticut court found appellant's claimed fee reasonable, it must either find hardship and breach the ten percent ceiling or maintain the ceiling and deny a portion of appellant's reasonable fee. In the former case it would put the full burden on the owner of the vested property, thus frustrating the object of the statute; the latter result would be unjust to the appellant *vis à vis* other fee claimants who had recovered in full without scrutiny of the reasonableness of their claims.

This dilemma is avoided and the policy of the statute is vindicated by permitting all fee claims to be heard in the section 20 phase of the

(*Continued from previous page*)
million after such deductions. (Whether the ten percent limit should be calculated before or after such deductions is one of the common questions on which appellant seeks intervention under F.R.Civ. P. 24(b)). Given the magnitude of the recovery, it is not unlikely that the court will decide to contain the aggregate of fees within the ten percent limitation and to make some equitable apportionment.

proceedings below. In *Kroll v. McGrath*, 91 App. D.C. 172, 199 F.2d 187 (1952), this court held that the court must have the fullest possible information regarding fees and section 20 determinations should not be made until all fee matters were before it. And such has been the approach of the courts that have dealt with the problem under amended section 20.

The case of *Rosden v. Kennedy*, 308 F.2d 451 (2d Cir. 1962), brought in the Southern District of New York, is illustrative. See the "Preliminary Statement" from the Government's brief in that case, in the Supplement hereto. All of the five claims to fees arising out of an administrative return were brought into a single proceeding. Three had been brought as independent petitions and were consolidated. The remaining two claimants were residents of the District of Columbia who were permitted to intervene to protect their fee interests. One of the latter said, in his affidavit:

> "Affiant's petition makes it clear that he is not asking for any increase in the compensation to which he has been entitled for more than ten years. Affiant joined in this action because he is a necessary party to any change in the aggregate fees, and because he is convinced beyond every doubt that other counsel have earned more than could have been paid them within the ten per cent limitation." (Sworn on May 22, 1961 and part of the court's record in the case.)

The fees claimed aggregated 36 percent of the recovery; the Attorney-General recommended a ceiling of thirteen percent. The fee claimants submitted affidavits of their time spent, difficulties encountered and results obtained. The district court made reasonable fee determinations as to each of the five fees. Supp. 4. The resulting aggregate was 27 percent, more than ten percent of the recovery, more than the 13 percent recommended by the Attorney-General, and less than

the 36 percent requested by the fee claimants. The Court of Appeals, having the same affidavits before it as the district court, made its own determinations of the reasonableness of the fees of the two claimants who appealed, and so modified the district court's order.

The Attorney General agreed, in *Rosden*, that the aggregate of fees there should have been more than ten percent, but vigorously opposed award of the full amounts of the fees claimed. He thus interpreted section 20 in accord with the above exposition; where the aggregate exceeds ten percent, each fee must be no higher than the court determines to be reasonable. There is no such thing as a hardship finding which opens Pandora's Box and allows fees in whatever amount claimed.

In *Annemarie Proebsting*, Civil 148-311 (S.D.N.Y. 1959), Supp. hereto p. 5, involving two fee claimants, the Attorney-General also recommended that the ten percent ceiling be pierced but that the court award a smaller aggregate than the claimants asked. The Government does not appear to be taking a different position on this appeal. Under familiar principles, this construction of the statute by the officer designated therein to administer it, is entitled to great weight.

Appellant's Case, Therefore, Meets the Requirements of Rule 24(a)

Should appellant not be permitted to intervene here, the court below will approve a schedule of fees which does not include an allowance for appellant's claim. There will probably be no determinations of reasonableness. In any event the fees scheduled will be paid without hope of recapture. Their legality will be res judicata. Should appellant in future go to the District Court for Connecticut, his situation would be irrevocably altered for the worse. This is all that is needed to meet the requirements for intervention of right laid down in Rule 24(a).

The Supreme Court did not, by a single sentence in *Sutphen Estates v. United States*, 342 U.S. 19, 21 (1951) rewrite Rule 24(a)(2), limiting it to cases which would be res judicata of the would-be intervener's rights. It discussed only the particular application of the Rule which there was relevant. This court recognized that fact in *Atlantic Ref. Co. v. Standard Oil Co.*, 113 App. D.C. 20, 304 F.2d 387 (1962). Nor did this Court, in the latter case, limit the non-res judicata application of Rule 24(a)(2) to reviews of administrative agency orders and regulations. To so limit *Atlantic Ref. Co.* would be reminiscent of the classic law school example of bad exegesis: the limitation of a replevin case to churns. Rather, this court held that where a judgment would result in substantial injury to the applicant and the applicant would have no remedy against its effects, the judgment to him is final and conclusive so as to entitle him to intervene under Rule 24(a)(2). This is an obviously correct exposition of the Rule. Res judicata and reviews of administrative orders and regulations are two applications; but can this court hold, as appellees urge, that they are the exclusive applications and exhaust the Rule?

No New Service of Process Is Required

If appellant may intervene as of right, it should be clear that he does not need to make new service of process upon anyone. Moore's Fed. Prac. (2d ed. 1963) ¶ 24.18. Indeed, on notice of his claim, the court below should require that he be brought in. If his claim is contested, the district court must necessarily, as a matter ancillary to its § 20 determination, determine its merits. Section 20 determinations are an integral, requisite and inevitable part of the suit for return of vested property for which Interhandel came into the district court. No return or payment may be made until the section 20 phase is executed. Text of section 20; *Kroll v. McGrath*, 91 App. D.C. 172, 199 F.2d 187, 188-89 (1952).[2]

[2] For this reason, Interhandel is mistaken in declaring that the vested property is no longer subject to the control of the court. (Interhandel br. p. 18)

In its argument regarding "fundamental considerations" (constitutional? statutory? nostalgic?), Interhandel asks this Court to limit the assertion of claims by intervention to those situations in which the claimant would have been able to begin an original action by personal service of process on his opponent within the territorial limits prescribed by Rule 4(f). In support of its proposed limitation on the effectiveness of the Federal Rules, Interhandel recites language, found in some cases, that the doctrine of ancillary jurisdiction[3] does not apply to service of process. (Interhandel Brief, p. 14).

Appellant **does not rely** on the doctrine of ancillary jurisdiction to establish the court's jurisdiction of Interhandel *in personam*, and he **has no quarrel** with the proposition that the doctrine does not apply to service of process. (Therefore, although appellant will discuss them below, all of the cases cited by Interhandel at page 15 of its Brief are inapposite.) As to any matter for which intervention is permitted under Rule 24(a) or 24(b), no service of process, as prescribed in Rule 4, is required. Rule 24(c) provides the manner by which an intervener may make a claim against a party already in the action. What other purpose can the first sentence of 24(c) have?

Rule 4(f) is no more "fundamental" than Rule 24(c). The law prior to the adoption of the Federal Rules of Civil Procedure, that an intervener might not assert a new claim without separate service of process, *In re Indiana Transportation Co.*, 244 U.S. 456 (1917),[4] has been

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[3] The doctrine of ancillary jurisdiction gives a court subject matter jurisdiction to decide a claim as to which subject matter jurisdiction would otherwise be lacking, in order to do complete justice. Walmac Co. v. Isaacs, 220 F.2d 108, 113-14 (1st Cir. 1954). If intervention is of right under Rule 24(a), or the court permits intervention under Rule 24(b), then ancillary jurisdiction of the subject matter is present. The considerations are identical. Cf. Barron & Holtzoff, §23, text at n. 29.1, regarding Rule 14.

[4] An intervener was permitted to assert a separate claim under Equity Rule 30, 198 Fed. xxvi. United States E. Bolt Co. v. H. G. Kroncke Hardware Co., 234 Fed. 868 (7th Cir. 1916).

superseded by Rule 24(c), which provides that service shall be made as provided in Rule 5. Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962); 4 Moore's Fed. Prac. ¶ 24.20. Rule 82, reflecting the Enabling Act, 28 U.S.C. § 2072, and providing that the Rules cannot enlarge the jurisdiction of the court, does not apply to personal jurisdiction, but only to subject matter jurisdiction; process is a procedural matter, only, and does not affect substantive rights. *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438 (1946). The Supreme Court said of Rule 4(f) in the *Murphree* case, as it might have said of process in general and all procedural rules, that "[I]t relates merely to the manner and the means by which a right to recover is enforced." 326 U.S. at 446. Also, see *Lesnik v. Public Industrial Corp.*, 144 F.2d 968, 973 (2d Cir. 1944);[5] *Ancillary Process and Venue in the Federal Courts*, 73 Harv. L. Rev. 1164 (1960).

The manner and territoriality of service can be changed by statute or Rule. Indeed, Rule 4(f) itself widens the territory in which service may be made from that prescribed in 28 U.S.C. 1693. The only "fundamental considerations" (Interhandel's language) are Constitutional requirements of due process, and these are served by adequate and timely notice, *National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 333, , 84 S.Ct. 411, 415 (1964), and, perhaps, a venue which fairly serves the balance of convenience of the parties and judicial economy. Congress may dispense with Rule 4(f) service even in bringing defendants originally before the court at the commencement of an action. In *Goldlawr, Inc. v. Heiman,* 369 U.S. 463 (1962) the Supreme Court approved transfer of an action pursuant to 28 U.S.C. 1406(a) although proper service was not, and could not have been, had upon the defendant. (In such a case, there is no requirement of new service in the transferee district.) The transfer statute has a limited, procedural,

[5] "[J] urisdiction [as used in Rule 82] is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon [subject matter] jurisdictional principles of long standing . . . ."

purpose, but so does Rule 24(c). With regard to procedure in the district courts, what Congress may do by statute, the Supreme Court may do by rule. *Mississippi Publishing Corp. v. Murphree, supra,* 326 U.S. at 442-43.

No process, in the sense of an original summons and complaint, is needed on an existing party in the following situations:

(1) A counterclaim, whether or not it relates to the subject matter of the original action, can be brought pursuant to Rule 13(a) and (b).

(2) A cross-claim, relating to the subject matter of the original action or property there involved, can be brought under Rule 13(g).

(3) Plaintiff and third-party defendant may assert claims related to the subject matter of the main action against each other under Rule 14(a).

(4) One who qualifies for intervention under Rule 24(a) or 24(b) may assert his claim in the manner provided by Rule 24(c).

It is not a novelty for an intervener to be permitted to come in and assert claims against the plaintiff in the original action although he would not have been able to acquire personal jurisdiction of the plaintiff in that forum as an original matter. See, e.g., *Stewart Warner Corporation v. Westinghouse Electric Corporation,* 325 F.2d 822 (2d Cir. 1963), *cert. den.* 376 U.S. 944 (1964), and *United States E. Bolt Co. v. H. G. Kroncke Hardware Co.,* 234 Fed. 868 (7th Cir. 1916). These were similar cases in which the plaintiff brought suit for patent infringement, and third parties intervened. The interveners joined in the the defendant's answer but, additionally, made independent claims against the plaintiff, some of which involved patents which were not involved in the original action. The respective courts of appeals held that the Federal Rules provided a means by which interveners may bring such claims: In *Stewart-Warner,* Rule 24; in *United States E. Bolt Co.,* Equity Rule 30, 198 Fed. xxvi. The court in *Stewart-Warner*

acknowledged that the particular claim could not have been so brought prior to the adoption of the Federal Rules. 325 F.2d at 827.[6]

In *Berman v. Herrick*, 30 F.R.D. 9 (E.D. Pa. 1962), a Pennsylvania citizen brought a diversity suit in a federal district court for Pennsylvania against two citizens of New York who held property in Philadelphia. After institution of the suit, the defendants sold the property and became no longer subject to personal service within Pennsylvania. Thereafter, a number of companies sought to intervene as plaintiffs under Rule 24(b) (permissive), asserting claims against the defendants which were similar to those made by the original plaintiff. The defendants opposed intervention on the ground, *inter alia*, that they were not subject to service of process within the jurisdiction of the court. The court upheld the interveners, and held that Rule 5 (referred to by Rule 24(c)) prescribes the appropriate service, citing 4 Moore's Fed. Prac. ¶ 24.20. The court reasoned along the lines discussed above.

Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957) was an action brought by the United States against an individual and a corporation for taxes and for a receivership. During the course of the proceeding, the individual died, his widow was brought in as a defendant, and a creditor intervened, asserting claims against the widow. The Court of Appeals upheld the intervener's claim against the widow's motion to dismiss it for lack of jurisdiction of her person.

In these two cases, *Berman v. Herrick* and *Lenz v. Wagner*, the successful intervener was asserting claims against a defendant in the original action, who was in court in the first place only under compulsion of process. The case is even stronger where, as here, the inter-

[6] The courts in these two cases also held that the plaintiff, by bringing its action, waived its venue privilege. Historically and properly viewed, process, apart from its notice function, is merely a regulation of venue. See Judge Clark's exhaustive discussion in Jaftex Corporation v. Randolf Mills, Inc., 282 F.2d 508, 512 (2d Cir. 1960).

venor seeks relief against the plaintiff in the main action, which has itself invoked the authority of the court. It ill becomes such a plaintiff, with full control over the forum and timing of the suit, to seek to escape adjudication of inextricably related matters by objecting that it could not have been served originally in the district.

In *Bank of Neosho v. Colcord*, 8 F.R.D. 621 (W.D. Mo. 1949), an interpleader action, a cross-claim under Rule 13(g) was upheld although the cross-claim defendant resided outside the district and was not subject to the process of the Court.

All of the authorities cited in Interhandel's brief, p. 15, are consistent with the above exposition. None of them involved intervention, or any of the Rules, such as Rule 24(c), which permits a claim to be made against one already in the case in a manner other than service of process within certain territorial limits.

Section 23 of Barron and Holtzoff, cited by Interhandel, does not purport to state what the law is or what the authors think it should be, but simply reports a dictum in *Lasch v. Antkies*, 161 F.Supp. 851 (E.D. Pa. 1958), and adds that there is doubt as to whether it is in accord with the policy against piecemeal litigation. Interhandel's cases, i.e., *Lasch v. Antkies, supra; Pearce v. Pennsylvania R.Co.*, 162 F.2d 524 (3d Cir. 1947); *Kappus v. Western Hills Oil Co.*, 24 F.R.D. 123 (E.D. Wisc. 1959); and *Phillips v. Murchison*, 194 F.Supp. 620 (S.D. N.Y. 1961) did not involve claims against parties already in the case, but involved the original, or the amended original, complaint by which the action was commenced. *Moreno v. United States*, 120 F.2d 128 (1st Cir. 1941), involved a cross-claim unrelated to the main action, for which no Rule provides, although the would be cross-claimant attempted to use Rule 14(a).

The Federal Rules on counterclaim, cross-claim, third-party practice, impleader, interpleader and intervention are intended to broaden the scope of litigation to settle related matters in the same

action, do complete justice, and avoid multiplicity of suits. Their effectiveness is not to be limited by a nostalgic view of process, itself a procedural matter, which has no basis in constitutional principles or in Title 28 of the United States Code.

Appellant's Claims for Relief Are Not Barred by Section 9(f) TWEA

Appellant's claims for relief are not barred by section 9(f) TWEA because he does not seek to impress a lien on, or otherwise obtain, vested property in the hands of the Alien Property Custodian or his successor. Rather, appellant seeks payment after the sale, out of Interhandel's share of the proceeds. Under section VIII of the Settlement Agreement, these will be held for Interhandel, at interest, in a special account in the Treasury to be called "Interhandel Corporation of Switzerland." The Government will have a security, not an ownership, interest in the account. Thus the cases in which fee claimants, or others, sought to impress liens on vested property and were barred by section 9(f), are totally inapposite, i.e. *Berger v. Ruoff*, 90 App D.C. 276, 195 F.2d 775, cert. den. 343 U.S. 950 (1952); *Von Opel v. Ueberzee Finanz Korporation*, 96 App. D.C. 230, 225 F.2d 530 (1955).

The Relief Appellant Seeks Against the Government Is Not Barred as an Unconsented Suit.

Because appellant seeks substantive relief only against Interhandel, not against the Government, his action is not barred as an unconsented suit; the Government is involved as stakeholder, only. (Indeed, appellant can see no justification for the Government's opposition to his intervention.) The Treasury's duty is ministerial: to release Interhandel's money to it on the instruction of the Attorney-General. Such suits are a commonplace in the District of Columbia, approved by this Court and by the Supreme Court. See, e.g., *Houston v. Ormes*, 252

U.S. 469 (1920); *Mellon v. Orinoco Iron Co.*, 266 U.S. 121 (1924); *Doerschuck v. Mellon*, 60 App. D.C. 383, 55 F.2d 741, 744-45 (1931). The plaintiff obtains satisfaction of his judgment by obtaining, in the same action, the appointment of a receiver and an order directing the Treasury to pay the money held for the defendant to the receiver, to be paid out in accordance with the judgment.

Respectfully submitted,

ROBERT M. HAUSMAN

One Farragut Square South
Washington, D.C. 20006

Attorney for Appellant,

DAVID GINSBURG
HAROLD LEVENTHAL
Of Counsel:

SUPPLEMENT TO APPELLANT'S REPLY BRIEF

Contents

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 27271

In the Matter of

FRANZ BERNHARD LEHMANN, deceased; ANITA KAY, Administrator of the Estate of Dorothy K. Lehmann, deceased,

GUTERMAN, et al. v. KENNEDY

GEORGE ERIC ROSDEN,
LAWRENCE BERENSON,

Petitioner-Appellants,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent-Appellee.

BRIEF OF THE ATTORNEY GENERAL OF THE UNITED STATES

Preliminary Statement

This is a consolidated appeal from two of five separate orders (Rosden App. 28a; Berenson App. 49a)[1] of the United States District Court for the Southern District of

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[1] References to the respective appendices printed by the appellants are denoted by the prefixes "Rosden" and "Berenson" followed by the appropriate page number. References to the record are prefixed "Rec" followed by the appropriate page number.

New York, Metzner, J., fixing counsel fees in an alien property proceeding pursuant to Section 20 of the Trading with the Enemy Act, 50 U.S.C. App. §20. The District Court awarded counsel fees aggregating $125,000 or almost 27% of the net amount returned to the claimant.[2] The sum was divided among counsel as follows (Berenson App. 52a):

George E. Rosden	—	$ 45,000
Abraham S. Guterman	—	30,000
Lawrence Berenson	—	30,000
Robert S. Caviness	—	18,000
Estate of Joseph J. Jacobs	—	2,000
Total		$125,000

Only attorneys Rosden and Berenson have appealed from the District Court's determination. The remaining counsel have acquiesced in Judge Metzner's decision. Appellant Rosden contends that he is entitled to at least $58,000 for his services, the true value of which he places at $105,000 (Rosden Brief pp. 1, 25; Rosden App. 26a).[3] Appellant Berenson contends that he is entitled to the

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[2] The final determination and return order dated March 28, 1961, directed the return to Anita Kay, Administratrix of the Estate of Dorothy K. Lehmann, deceased, of the sum of $630,200.21 "subject to any increase or decrease resulting from the administration thereof prior to return and after adequate provision for taxes and conservatory expenses" (App. 3a-4a). Accordingly, the net amount returnable to the claimant is $465,540.77 (Rec. 286).

[3] Actually appellant Rosden's position on this point is somewhat obscure. In the conclusion of his Brief (p. 25) Mr. Rosden asks for a fee of $58,000, or, alternatively, for something greater by way of "*quantum meruit.*" In the preliminary statement of his Brief (p. 1), he values "*quantum meruit*" at $105,000. In his petition for fees underlying this appeal (Rosden App. 14a), Mr. Rosden sought $100,000.

sum of $50,000 for his services, the "fair and reasonable" value of which he estimates at between $75,000 and $100,000 (Berenson Brief pp. 6, 23, 27, 35; Berenson App. 22a).

The proceedings in the District Court were instituted by attorney Guterman on April 14, 1961, by the filing of a petition to allow fees in excess of 10% of the value of the property returned (Rec. 1-13). Thereafter, appellant Rosden and attorney Caviness moved to intervene as co-petitioners (Rosden App. 3a-14a; Rec. 60-65) and appellant Berenson and the Estate of attorney Joseph J. Jacobs filed independent petitions to determine their fees (Berenson App. 5a-37a; Rec. 269-275). All five applications were consolidated and, on June 5, 1961, granted to the extent of fixing the following fees (Rosden App. 28a; Berenson App. 41a; App. 1a, 32a):

Rosden	—	$ 40,000
Guterman	—	20,000
Berenson	—	25,000
Caviness	—	15,000
Jacob's Estate	—	2,000
Total		$102,000

Not satisfied with the initial determination, counsel then moved in the District Court for reargument or, alternatively, for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure amending Judge Metzner's orders to reflect the amounts originally demanded. On July 3, 1961, the motions for reargument were granted and upon reargument fees aggregating $125,000 allowed (Rosden App. 28a; Berenson App. 49a; App. 33a). Appellant Rosden's fee was increased from $40,000 to

$45,000; appellant Berenson's fee was increased from $25,000 to $30,000. Still not satisfied, appellant Berenson made a further application to amend Judge Metzner's order of July 3, 1961, by increasing his fee to $50,000 or, alternatively, to permit oral reargument (Berenson App. 51a-56a). This further application was denied on July 20, 1961 (Berenson App. 56a), and Mr. Berenson appeals from this denial as well as from the order of July 3, 1961, fixing his fee at $30,000.

Counsel had originally demanded fees aggregating $178,500, or approximately 36% of the value of the property returned (Berenson App. 52a). Respondent agreed that counsel were entitled to fees in excess of the statutory 10%, but protested that they demanded too much (Berenson App. 52a; Rec. 284-292). The Government recommended fees aggregating $60,000, or about 13% of the value of the property actually returned, of which sum appellant Rosden was to receive $30,000 and appellant Berenson $15,000 (Berenson App. 52a). Judge Metzner found the Government's recommendation too low and counsels' demands too high.

The situation below may be summarized as follows:

	Fees Demanded	Government Recommendations	Amounts Originally Allowed	Amounts Allowed After Reargument
Rosden	$ 58,000	$ 30,000	$ 40,000	$ 45,000
Berenson	50,000	15,000	25,000	30,000
Guterman	40,000	5,000	20,000	30,000
Caviness	28,000	10,000	15,000	18,000
Jacobs' Estate	2,500	-0-	2,000	2,000
	$178,500	$ 60,000	$102,000	$125,000

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#23304

U.S.District Court
Filed
Aug. 13 1959
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

ANNEMARIE PROBSTING

CIVIL 140-311

Title Claim No. 62315 Office of Alien Property, Department of Justice

Dallas S. Townsend, Director, Office of Alien Property, Department of Justice

- -x

M E M O R A N D U M

BRYAN, District Judge:

This is a petition under Section 20 of the Trading with the Enemy Act (50 U.S.C., App. § 20) for the approval of this court of fees of the attorney and a representative of a claimant who has recovered property vested in the Office of Alien Property.

The claimant, a citizen of Germany, resided in that country throughout the war and was classified as an enemy alien. The vested property consisted of a bank account and stock at the Bank of Manhattan Company in New York, maintained in the name of the claimant's late sister. The claimant inherited this property in accordance with the laws of Switzerland, where her sister died. The amount of

her inheritance is approximately $272,000. This amount has now been recovered by the claimant after protracted and complicated proceedings before the Office of Alien Property.

Section 20 of the Trading with the Enemy Act provides that no property shall be returned under the Act unless satisfactory evidence is furnished "that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment * * * does not exceed ten percentum of the value of such property". However, any such agent, attorney or representative who believes that the aggregate of the fee should be in excess of 10% may "petition the District Court of the United States for the District in which he resides for an order authorizing fees in excess of ten percentum * *". The court hearing the petition "shall approve an aggregate of fees in excess of ten percentum of the value of such property * * * only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess".

The attorney for the claimant notified the Director of the Office of Alien Property that in view of the 10% limitation placed upon the fees payable to attorneys, agents or representatives, he would petition this court on his own behalf and on behalf of the European representative of the claimant, who participated in the

investigation and preparation of the case, for compensation in excess of 10% upon the grounds specified in Section 20. This petition was thereupon brought in this District where the attorney for the claimant resides, and duly served upon the Director of the Office of Alien Property, as the Act requires. It seeks the allowance of fees of $48,000 for the attorney for the claimant and $16,000 for the claimant's European representative, or a total of $64,000. This amount is slightly under 25% of the value of the property recovered. 10% amounts to $27,200. The petition sets forth at length the special circumstances of unusual hardship which the applicants urge require payment of the excess requested. Annexed is an affidavit from the claimant consenting to the fees requested, and urging approval in that amount.

Upon the hearing of the petition before me the Director of the Office of Alien Property appeared by counsel. It was conceded there were special circumstances which would justify an allowance of fees in excess of the 10% provided by statute, and no objection was interposed to approval of some excess. While counsel for the Office did not make any recommendation to the court, he expressed the view that an additional allowance above the 10% of $7,000 overall would be reasonable.

Claimant sought return of her inheritance under Section 32(a)(2)(D) of the Trading with the Enemy Act on the ground that,

though an enemy alien, in consequence of the laws, decrees and regulations of Germany, discriminating against racial or religious groups, she did not enjoy full rights of citizenship under the law of Germany.

Under this section of the Act Germans of Jewish ancestry have been generally granted returns of vested property by the Office of Alien Property. However, the claimant was of Christian ancestry and of the Christian religion. She had become engaged to a Jewish doctor in Germany. Because of her close relationship with her fiancé and her loyalty to him she was subject to extended and vicious persecution by the Gestapo. She was treated as a Jewess and classified by the Gestapo and the government as such. On the other hand, she was relatively free as compared with Jews generally and was never prosecuted or legally imprisoned for violating Nazi racial laws or segregated in her residence as a Jewess. Thus the burden of establishing that she came within the terms of Section 32(a)(2)(D) was extremely onerous.

This was apparently the first case in which one in claimant's position was permitted to recover under Section 32(a)(2)(D). Recovery was made possible only through the industry, diligence, persistence and skill of her representatives, and particularly of her attorney in New York.

It was necessary painstakingly to reconstruct step by step the story of her relations with her fiancé and her consequent persecution. Practically all of the official records in Cologne and Wiesbaden, where claimant lived, had been destroyed. Many witnesses had died. Others were scattered in various parts of Germany and were difficult to locate. Examinations had to be conducted of large numbers of persons who had known the claimant personally before and throughout the war, as well as German officials in several cities. These examinations were conducted in various parts of Germany, including such cities as Berlin, Bonn, Cologne, Wiesbaden, Mainz, Mannheim, Essen, Dusseldorf and Wiel. There were also numerous interviews with officials at the Swiss border and with the claimant and her Swiss attorney at Zurich, Switzerland, where she resided.

The claimant was in a highly nervous and confused state as a result of her experiences. She was examined at Milan, Italy, by the Overseas counsel of the Claims Section of the Office of Alien Property at which the claiment's attorney was present but was not permitted to cross-examine. Because of the difficulties under which this examination was conducted, and the denial of the right of cross-examination to claimant's attorney it finally became necessary to bring the claimant to the United States to testify before the

Hearing Examiner of the Office of Alien Property.

The recommended decision of the Hearing Examiner in claimant's favor, which was approved by the Director of the Office of Alien Property, recites the facts in detail and makes the difficulties with which claimant's representatives were confronted abundantly apparent. It is unnecessary to go into further detail concerning these matters here.

It should be said, however, that the investigations necessary to ascertain the facts and whereabouts of witnesses, the interviewing of witnesses, the assembling of statements, affidavits and documents in support of the claim, the trial of the case before the Hearing Examiner and the appeals to the Director covered a period of almost five years and involved a prodigious amount of work and effort. During this period the attorney for the claimant made numerous trips to Europe and covered a large part of Germany in the course of his investigations. He received invaluable assistance from claimant's German representative who, among other things, secured a finding from the German Restitution Court that the claimant was a persecutee of the Hitler government. This decision was given considerable weight by the Hearing Examiner of the Office of Alien Property and was of material aid in the final successful result.

The claim was strongly contested by counsel for the Claims

section of the Office of Alien Property throughout. Difficulties in proof were encountered and surmounted at every turn.

Moreover, the claimant was totally without funds. The services rendered by her representatives were necessarily entirely contingent upon ultimate success. It was necessary for her attorney to finance the very large expenses of the investigations and the trial himself with no possibility of reimbursement by the claimant unless the claim was ultimately successful.

While there is no precise calculation in the moving papers of the amount of time spent by the claimant's representatives on this matter, it is apparent from the summary of their services that the amount of time involved was very large and covered in total many months of almost exclusive preoccupation with this claim. Much time was spent in Germany, in Switzerland, in Italy and Washington, as well as in office work and research. These representatives have earned and are entitled to substantial fees.

Section 20 is designated to protect the owner seeking restoration of seized property "from unreasonable or even extortionate fees for services". Kroll v. Eberath, D.C.Cir., 199 F. 2nd 187. It is not designed to preclude representatives of claimants from receiving just and reasonable compensation for the services which they rendered. The authority given for application to the court for fees in excess of 10% of the value recovered "upon a finding

that there exist special circumstances of unusual hardship which require the payment of such excess" contemplates the award of fair and just compensation where such circumstances are shown to exist. I find that special circumstances of unusual hardship exist here which require that the applicants be paid fees in excess of 10% of the value of the property recovered.

In my view the suggestion made by counsel for the Director of the Office of Alien Property that the fees in excess of 10% should be limited to $7,000 does not in any way do justice to the representatives of this claimant or afford them fair and reasonable compensation for the services that they rendered.

In my view the compensation which they seek of $48,000 for the claimant's New York attorney and $16,000 for her German representative, is fair, reasonable and just compensation for the services rendered in this case. The claimant herself, recognizing the extraordinary nature and effectiveness of the services which have been rendered to her states that she is entirely agreeable to the payment of these sums, and, indeed, urges that such allowances be made. Far from being unreasonable or extortionate, the compensation which the applicants seek, while substantial, is entirely commensurate with the value of the services which they rendered, taking into account the time and effort involved, the difficulties

of the case, the professional skill required and demonstrated, the novelty of the questions presented, the amount involved, and the final wholly successful result. The proportion of these fees to the recovery (slightly under 23%) is also reasonable under the circumstances.

I therefore approve fees of $48,000 to Lawrence Berenson, Esq. for services rendered as attorney for the claimant, and fees of $16,000 to Carl E. Ullmann, Esq. for services rendered as the representative in Germany of the claimant. These sums, of course, are inclusive of the 10% of the recovery previously allowed.

Settle order on notice to the Director of the Office of Alien Property.

Dated: New York, N. Y.
Aug. 12, 1959

FREDERICK VP. BRYAN
U.S.D.J.

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